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Collective Humanitarian Intervention

Fernando R. Tesón
Arizona State University

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COLLECTIVE HUMANITARIAN INTERVENTION

*Fernando R. Tesón**

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INTRODUCTION

Until very recently, those who favored the legitimacy of humanitarian intervention were regarded either as hopeless idealists, or worse still, as trigger-happy "moral imperialists." Yet, the doctrine of humanitarian intervention has experienced a dramatic revival with the end of the Cold War. The realignment of global political forces and the awareness of the crucial link between human rights and peace have produced a significant change of opinion among governments and writers on the subject. While opinion is still sharply divided on the issue of *unilateral* humanitarian intervention, most international actors and observers are rallying behind the idea that the United Nations Security Council may, in appropriate cases, act forcibly to remedy serious human rights deprivations and their moral equivalents. In this article, I defend the legitimacy of collective humanitarian intervention, particularly when authorized by the Security Council.

* Professor of Law, Arizona State University. S.J.D., Northwestern University School of Law (1987); Lic. Dr. Int'l, University of Brussels (1982); J.D., University of Buenos Aires (1975). Many thanks to Tom Farer and David Wippman for their helpful comments on previous drafts of this article.

The Charter of the United Nations prohibits the organization from intervening "in matters which are essentially within the domestic jurisdiction of any state."¹ This limitation does not apply to the enforcement measures taken by the Security Council under Chapter VII of the Charter. The prohibition in Article 2(7) is but one expression of the broader duty not to intervene in matters that fall within the domestic jurisdiction of sovereign states.² But the principles and policies that govern *unilateral* intervention differ substantially from those that govern collective intervention, especially when collective intervention is authorized by international organizations such as the United Nations or the Organization of American States.³

This article discusses collective intervention authorized by the Security Council, with a special emphasis on the concept of exclusive domestic jurisdiction. Part I first examines the different meanings of the notoriously ambiguous word "intervention." Because the legitimacy of collective intervention will depend in part on whether or not the matter falls within the domestic jurisdiction of the target state, Part II will then discuss contemporary views of domestic jurisdiction. Finally, Parts III and IV discuss collective humanitarian intervention under the principles of the U.N. Charter and examine the practice of the Security Council since the end of the Cold War. This article concludes that international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention — of military measures authorized by the Security Council for the purpose of remedying serious human rights violations. While traditionally the only ground for collective military action has been the need to respond to breaches of the peace, especially aggression, the international community now has accepted a norm that allows collective humanitarian intervention to respond to serious human rights abuses.

1. U.N. CHARTER art. 2, ¶ 7.

2. The traditional Cold War view of non-intervention is reflected, *inter alia*, in the *Declaration of Principles on International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

3. See FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 205–14 (1988). For a classic overview of the principle of non-intervention, see ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., *NON-INTERVENTION* (1956). See also Tom J. Farer, *The Regulation of Foreign Intervention in Civil Armed Conflict*, 142 R.C.A.D.I. 291 (1974); the essays collected in *INTERVENTION IN WORLD POLITICS* (Hedley Bull ed., 1984); and those in *TO LOOSE THE BANDS OF WICKEDNESS: INTERNATIONAL INTERVENTION IN DEFENCE OF HUMAN RIGHTS* (Nigel S. Rodley ed., 1992).

I. SOFT, HARD, AND FORCIBLE INTERVENTION

The customary meaning of prohibited intervention in international law denotes "dictatorial interference . . . in the affairs of another State for the purpose of maintaining or altering the actual condition of things."⁴ Prohibited intervention in international law involves, therefore, some kind of coercive action. The International Court of Justice has confirmed this definition of prohibited intervention. According to the Court, acts of prohibited intervention must be coercive, and they must be aimed at thwarting choices by the target state that must remain free under international law.⁵ Thus the *means* of the intervention must be coercive (although not necessarily *forcible*) and the *end* of the intervention must be to influence another state (by effect of the coercion exercised) on a matter falling under the state's domestic jurisdiction.⁶ Both requirements must be met for an action to be called "prohibited intervention" in this traditional sense.

Obviously, the word "intervene" in Article 2(7) cannot have this meaning. Rather, that article prohibits any United Nations organ from merely *discussing, examining, or issuing recommendations* on matters that fall within the state's domestic jurisdiction.⁷ The prohibition in Article 2(7) thus covers *non-coercive* action by the United Nations: the word "intervene" is used here in its ordinary, non-technical sense, not as a legal term of art. This is confirmed by the fact that Article 2(7) expressly *exempts* from the prohibition those cases where the organization is entitled to take coercive enforcement measures under Chapter VII of the U.N. Charter. Thus, in the context of United Nations law, we need to ask two questions. First, what is the present scope of domestic jurisdiction removed from the scrutiny of the United Nations under Article 2(7)? Second, can the United Nations validly adopt coercive measures, including force, to remedy a situation *other* than a breach of the peace or act of aggression?

4. 1 L. OPPENHEIM, INTERNATIONAL LAW 305 (H. Lauterpacht ed., 8th ed. 1955); see also C. ARELLANO GARCÍA, DERECHO INTERNACIONAL PÚBLICO 465-66 (1983).

5. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 107-08 (June 27) [hereinafter *Nicaragua Case*].

6. I have discussed these elements of intervention at some length in TESÓN, *supra* note 3, at ch. 9.

7. See H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 166-73 (1950); see also DJURA NINČIĆ, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS 161-70 (1970); D.R. Gilmour, *The Meaning of "Intervene" Within Article 2(7) of the United Nations Charter — An Historical Perspective*, 16 INT'L & COMP. L.Q. 330 (1967).

As a preliminary matter, it is necessary to distinguish between three different meanings of "intervention," according to the degree of coercion utilized in the attempt to influence other states. The first is the sense in which the word is used in Article 2(7). In this sense, "intervention" means simply discussion, examination, and recommendatory action: this I will call *soft* intervention. The second meaning of the word "intervention" refers to the adoption of measures that (unlike soft intervention) are coercive but do not involve the use of force, such as economic and other kinds of sanctions: this I will refer to as *hard* intervention. And finally, the word "intervention" is often used to refer to acts involving the use of force (as in "humanitarian intervention"): this I call *forcible* intervention. The important issue regarding forcible intervention is that the use of force is subject to independent legal constraints. Therefore, a situation which could qualify for collective soft or hard intervention may nevertheless not be appropriate for collective forcible action.

The distinction between the different forms of intervention according to their degree of coercion leaves intact a common requirement: prohibited intervention has to be an action aimed at influencing a government on an issue where the target state has legal discretion. This is plain in the case of soft intervention, where the only issue is an issue of *ends*, not of means, since the means are perfectly permissible in principle. But the same is true in cases of hard and forcible intervention. If state *A* violates a fishing treaty with state *B*, and *B* adopts economic sanctions in retaliation, *B*'s action will not be deemed "intervention." The matter did not fall within *A*'s exclusive jurisdiction because *A* was not legally free to violate the treaty. Instead, the legality of *B*'s retaliation will be determined by the law of countermeasures, in particular by the principle of proportionality. If, however, state *A* decides to nationalize certain natural resources, and *B* responds by declaring an economic embargo against *A*, this action amounts to prohibited hard intervention. *B*'s action is coercive, although not forcible, and *A* has, in principle and absent an international commitment, exclusive jurisdiction over the question of nationalization of natural resources. In this example, *B* has no right to coerce *A* into reversing the nationalization.

The same analysis applies to forcible intervention. Applying the general requirements that define unlawful intervention, prohibited forcible intervention will occur when two conditions are met: first, the action by the intervenor can be described as indirect or direct use of force; and second, the "choices" that the intervenor attempts to influence should remain "free" for the target state — they must fall under its

exclusive jurisdiction.⁸ The same two requirements must be met. If a state violates a trade agreement with another state, and the latter retaliates with a limited forcible measure, this would violate the prohibition on the use of force, since treaty breaches of this kind do not justify the use of force. It would not violate the principle of non-intervention, however, because actions concerning a treaty are not within the legal discretion of the target state.⁹ The assessment of all three forms of intervention depends on the determination of whether a matter falls within the domestic jurisdiction of a state.

II. THE CONCEPT OF EXCLUSIVE DOMESTIC JURISDICTION

The concept of exclusive domestic jurisdiction has been the subject of controversy both during the life of the League of Nations and in the United Nations era. Two schools of thought compete. According to the first one, there are matters that *necessarily* fall within the domestic jurisdiction of states. The *essence* of sovereignty requires that certain matters be left outside the reach of international law, particularly matters broadly referred to as *domestic policy*.¹⁰ Such matters definitely ought not to be subject to action undertaken by international organizations. According to this view, the concept of domestic jurisdiction does not depend on the development of international law, because it is not relative but fixed, at least as long as we continue to live in a world of sovereign states. The essential attributes of the sovereign state require that certain matters be left to the state's own sovereign judgment. There are, therefore, matters that fall *essentially* within the domestic jurisdiction of states — just as the language of Article 2(7) suggests. Those who defend the essentialist view give various versions of the content and scope of domestic jurisdiction, but the common theme is that

8. I use the phrases "exclusive domestic jurisdiction" or "domestic" jurisdiction interchangeably, although technically those areas where the state is legally "free" may or may not concern "domestic" matters. For example, choices regarding foreign policy are not "domestic," but they may be legally discretionary and thus within the exclusive jurisdiction of the state. For example, G.A. Res. 2625, *supra* note 2, prohibits intervention in the *internal or external* affairs of other states. Although the issue is a general one of the permissible limits of state influence, technically, only intervention in internal affairs gives rise to issues of *domestic* jurisdiction.

9. If the aggrieved state responds instead by invading the wrongdoer (as opposed to merely retaliating) this will of course be a violation of the principle of non-intervention as well.

10. Most of the scholars in the pre-United Nations era favored this view. See, e.g., PAUL FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 396-97 (1922); THEODORE WOOLSEY, *INTERNATIONAL LAW* 50 (4th ed. 1874).

matters pertaining to exclusive domestic jurisdiction are those that are closely related to the sovereignty of the state.¹¹

The second position is the *legalist* view of domestic jurisdiction. Whether a matter falls within the state's *domaine réservé* cannot be determined by appealing to the notion of sovereignty, but is instead a relative matter which depends on the state of international law at any given time in history.¹² Thus, to cite the most notorious example of such evolution, human rights were a matter of exclusive domestic jurisdiction before 1945, but this is no longer the case today.¹³ Where a rule of international law regulates an issue, it automatically ceases to be a matter of exclusive domestic jurisdiction for the states formally bound by the rule.¹⁴

There are problems with both positions. The essentialist view can only be defended by appealing to an abstract and autonomous *normative* conception of state sovereignty. The gist of the essentialist argument is that certain matters *ought not* to be regulated by international law, come what may. But this cannot be defended without providing a justification of state sovereignty in the first place; otherwise the argument becomes

11. Thus, for example, a commentator opines that "[i]t has always been considered that the constitutional, political, and social organization of a state is essentially a matter coming under the latter's sovereignty, i.e. within its domestic jurisdiction." NINČIĆ, *supra* note 7, at 186. The essentialist view is supported by the wording of Article 2(7) of the U.N. Charter. For the difference between the U.N. Charter and Article 15(8) of the League of Nations Covenant, see the excellent discussion in HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 196-98 (1952). Some early commentators read Article 2(7) as leaving that decision to the state concerned because, unlike the Covenant, Article 2(7) makes no reference to a United Nations organ with powers to decide jurisdictional matters. See, e.g., *id.* As it turned out, United Nations practice has not followed this interpretation. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 65-67 (1963). See also *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. 4 (Mar. 3) (Article 2(7) no bar to rendering advisory opinion).

12. The classic citation for this proposition is the dictum by the Permanent Court of International Justice in the *Nationality Decrees* Advisory Opinion: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." *Nationality Decrees in Tunis and Morocco*, 1923 P.C.I.J. (ser. B), No. 4, at 24 (Feb. 7).

13. See *infra*, part II.A.

14. The International Court of Justice seems to have adopted an intermediate position. For the Court, there is a *presumption* that a matter which is traditionally described as a matter of domestic policy falls within the exclusive domestic jurisdiction of the state. See *Nicaragua Case*, *supra* note 5, at 131. This approach is quite close to the essentialist view of domestic jurisdiction. That presumption, however, can be rebutted by a showing that the state has bound itself internationally, through custom or treaty with respect to the issue. *Id.* at 131. This view is a concession to the legalist position. Thus, the Court held that whether the government is freely elected is a matter presumptively falling within the domestic jurisdiction of the state, but that there is no principled obstacle to a state committing itself to holding free elections. *Id.* I have criticized the Court's view in Fernando R. Tesón, *Le Peuple, C'est Moi!: The World Court and Human Rights*, 81 AM. J. INT'L L. 173 (1987). See *infra*, part II.B.

circular — “exclusive domestic jurisdiction derives from the attributes of sovereignty, and sovereignty consists of matters that are within the state’s exclusive domestic jurisdiction.” The essentialist view is less a theoretical explication of domestic jurisdiction than a *moral* injunction to international actors not to intervene in matters thought to be closely bound with the sovereignty of the state.¹⁵

At first blush, the legalist position seems closer to the truth. Indeed, international law *defines* the boundaries of state sovereignty. Yet the problem with the legalist position is that, without more, it is tautological. It simply says that domestic jurisdiction ends where international jurisdiction begins. This is true but trivial: *where exactly* does international jurisdiction take over? At least the essentialist view had some, perhaps unattractive, suggestions about substance. Legalism needs to provide a criterion to decide which matters fall within the state’s exclusive domestic jurisdiction, and the answer will depend on the operational definition of international law. Only custom and treaties count in a strictly positivist view of international law. By contrast, moral principles, purposes, and policies also count in a more teleological view of international law. Domestic jurisdiction swells or shrinks accordingly.¹⁶

I will not attempt to give a complete answer to this jurisprudential controversy here, except by saying that the “substantial international effects” policy seems outmoded today. To buttress this conclusion, I will review a number of areas where the concept of domestic jurisdiction has undergone spectacular transformations in recent years. Areas which have traditionally been claimed by states as falling within their *domaine réservé* are now unequivocally subject to review by international bodies, and to soft and hard intervention by international organizations.

15. The essentialist view of domestic jurisdiction is thus a version of anti-cosmopolitan nationalism, and it will stand or fall with it. If, for example, one believes that state sovereignty is not autonomous or original, but instead derived from more basic moral principles such as individual dignity and human rights, then the essentialist view of domestic jurisdiction in this all-or-nothing form is harder to defend. I defend a derivative concept of sovereignty in FERNANDO R. TESÓN, *THE PHILOSOPHY OF INTERNATIONAL LAW* (Westview Press, forthcoming). If one has a derivative definition of state sovereignty, one can make distinctions regarding state sovereignty and the conditions under which it has normative weight against foreign intervention. These distinctions will be based, perhaps, on different degrees of domestic legitimacy.

16. Some writers clearly have seen this weakness of the legalist position. It is not enough to say that domestic jurisdiction ends where international jurisdiction starts; nor is it possible to say that the United Nations organs may decide the issue on a case-by-case basis. A policy or principle is needed to decide in individual cases whether a matter is within the domestic jurisdiction of states. Professor Rosalyn Higgins, in her seminal discussion of domestic jurisdiction thirty years ago, proposed the policy that “states must be made responsible to the international community when their actions cause substantial international effects.” HIGGINS, *supra* note 11, at 62.

A. Human Rights

Human rights have long been subtracted from the exclusive domestic jurisdiction of states. This is notwithstanding the fact that they seem to constitute the paradigm of an "essentially" domestic matter since they define the relationship between government and subjects. Writers already had reached this conclusion in the early discussions of the concept of domestic jurisdiction in the U.N. Charter, citing not only the well-known provisions of the Charter, but also a number of human rights cases that had been addressed by the various organs of the United Nations.¹⁷

The proposition that human rights are no longer a matter of exclusive domestic jurisdiction is indisputable, independently of the legal grounds for the obligation of states to respect human rights.¹⁸ The General Assembly routinely adopts resolutions concerning human rights. Many are addressed to the membership in general, but some are addressed directly to particular states. Thus the General Assembly recently passed resolutions on the human rights situation in Bosnia-Herzegovina;¹⁹ El Salvador;²⁰ Iraq;²¹ Myanmar (formerly Burma);²² Afghanistan;²³ territories occupied by Israel;²⁴ Haiti;²⁵ and Iran.²⁶ Admittedly, some of these cases, such as the "intifada" in the territories occupied by Israel or the situation

17. See, e.g., HIGGINS, *supra* note 11; Felix Ermacora, *Human Rights and Domestic Jurisdiction*, 124 R.C.A.D.I. 371, 436 (1968-II). The most famous case is the case of South Africa which, contrary to the widespread opinion that the basis for the exercise of United Nations powers was the "international effects" test, is and was a human rights case. Maintaining and enforcing a system of *apartheid* is not a valid "domestic jurisdiction" choice for a state, regardless of whether it is deemed to produce international effects.

18. See generally Burns Weston, *Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY 14 (Richard P. Claude & Burns H. Weston eds., 2d ed. 1992).

19. G.A. Res. 242, U.N. GAOR, 46th Sess., Agenda Item 150, U.N. Doc. A/RES/46/242 (1992).

20. G.A. Res. 133, U.N. GAOR, 46th Sess., Agenda Item 98, U.N. Doc. A/RES/46/133 (1992).

21. G.A. Res. 134, U.N. GAOR, 46th Sess., Agenda Item 98, U.N. Doc. A/RES/46/134 (1992).

22. G.A. Res. 132, U.N. GAOR, 46th Sess., Agenda Item 98, U.N. Doc. A/RES/46/132 (1992).

23. G.A. Res. 136, U.N. GAOR, 46th Sess., Agenda Item 98, U.N. Doc. A/RES/46/136 (1992).

24. G.A. Res. 76, U.N. GAOR, 46th Sess., Agenda Item 33, U.N. Doc. A/RES/46/76 (1992).

25. G.A. Res. 7, U.N. GAOR, 46th Sess., Agenda Item 145, U.N. Doc. A/RES/46/7 (1991).

26. G.A. Res. 173, U.N. GAOR, 45th Sess., Agenda Item 12, U.N. Doc. A/RES/45/173 (1991).

in Afghanistan, do produce substantial international effects and can therefore be explained by reference to the traditional test. The General Assembly seldom offers this rationale, however. In the case of Myanmar, the General Assembly simply recalled that states have an obligation to promote and protect human rights in accordance with the applicable international human rights instruments.²⁷ In the case of El Salvador, although a civil war of serious regional repercussions was taking place, the General Assembly could not overemphasize the importance of observing human rights, "full respect of which is essential to the attainment of a just and lasting peace." No references to international repercussions are cited in the case of Haiti either. In those cases of human rights violations that do threaten international peace and security, such as *apartheid* in South Africa, action by the United Nations is legally *overdetermined*: the "international effects" test *and* the human rights violations provide equally valid grounds for soft intervention.

That human rights violations warrant United Nations soft intervention has ceased to be a matter of controversy. Governments singled out by the General Assembly rarely claim nowadays that such action violates Article 2(7) of the U.N. Charter. Because the General Assembly treats the Charter and the Universal Declaration of Human Rights as establishing definite obligations for members, violations of such obligations can trigger action by the appropriate United Nations body.

B. *Form of Government: Democracy*

Many writers and governments who accept the premise that the observance of human rights, in the sense of a government's *treatment* of its own citizens, is now an appropriate subject for international scrutiny, nonetheless draw the line at the question of the *legitimacy* of the government itself. They argue that *this* is a question of domestic jurisdiction, if there ever was one. In the absence of widespread human rights violations, so the argument goes, the international community should not be in the business of passing judgment on the legitimacy of the *origin* of a government.²⁸ The question of internal political legitimacy is, in this view, a matter falling under the exclusive jurisdiction of the state and exempt from even soft intervention by international organizations or by the international community as a whole.

27. G.A. Res. 132, *supra* note 22, at 1.

28. This was the virtually unanimous view before 1948. See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 549-69 (1992).

There are *a priori* reasons to doubt the conclusion that international law is or should not be concerned with democratic legitimacy. First and fundamental is the question of *agency*. If international law is largely created by nation-states, then the international community needs some criterion to determine when some official actually *represents* the state. Traditional international law has proposed the criterion of *effectiveness*. A government is the international representative of a people living in a territory if that government has effective political control over that people.²⁹ Traditional international law is indifferent to how that political control has been acquired.

Such a view is indefensible. If the international system is going to be the result of what the "peoples of the United Nations" want it to be,³⁰ then it makes sense to require that the government participating in the creation of international law be the real representative of the people who reside within the state's boundaries. A rule requiring democratic legitimacy in the form of free adult universal suffrage seems the best approximation to actual political consent and true representativeness.

Second, there are strong grounds for believing that democratic rule is a necessary condition for enjoying other human rights. While it is always possible to imagine a society where human rights are respected by an enlightened despot, this has never occurred in practice. This is why the right to political participation is included in the major human rights conventions.³¹ The right to participate in government is a very important human right in itself; it is also instrumental to the enjoyment of other rights. Its violation should therefore trigger appropriate international scrutiny.

The third reason for requiring democratic rule is the one indicated by Kant: democracies are more peaceful, and therefore a rule requiring democratic rule is consonant with the ideal of a lasting world peace, in a way that the rule of effectiveness, by countenancing tyranny, is not.³²

29. The classical view is summarized in RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 210 cmt. d (1985).

30. See U.N. CHARTER pmbl.

31. See International Covenant on Civil and Political Rights, *adopted on Dec. 19, 1966*, art. 25, 99 U.N.T.S. 171, 179; American Convention on Human Rights, Nov. 22, 1969, art. 23, 36 O.A.S.T.S. No. 36, at 1, O.A.S. Doc. OAE/Ser.L/V/II.23, doc. 21, rev. 6, *reprinted in* 9 I.L.M. 673, 682 (1970); Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262, 264; African Charter on Human and Peoples' Rights, art. 13, 21 I.L.M. 59, 61 (1982).

32. I summarize here the argument I made in Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 74-81 (1992). The argument relies on the seminal research by Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs (Part I)*, 12 PHIL.

This is because tyrannies tend to be more aggressive *and* because the difference in regimes is a major cause of conflict. Democracies have built-in mechanisms which cause them to avoid war with one another altogether. The reason why democracies are sometimes belligerent is that they often perceive threats to their democratic institutions by illiberal regimes. These threats are sometimes real and sometimes imaginary, which is why democracies also get involved in unjustified wars. But these wars are always against illiberal regimes. Democracies *do not* make war against one another. If the aim of international law is to secure a lasting peace where the benefits of international cooperation can be reaped by all, then international law has to require democratic legitimacy.

But even if none of this was true, international law should require democratic rule simply because it is the right thing to do. I do not need a complicated philosophical defense of democracy: a simple comparison with the traditional rule of effectiveness will suffice. Traditional international law *authorizes* tyranny. It gives *carte-blanc* to anyone who wishes to bypass popular will and seize and maintain power by sheer political force. This is delicately described by pertinent international materials as a state's right to "choose" its political system.³³ Such a state-centric view suffers from acute moral and conceptual poverty. Both ordinary common sense morality and the structure of international law, by presupposing agency and representation, require that governments should be recognized and accepted in the international community only if they genuinely represent their people.

These arguments suffice, I believe, to demonstrate why international law must recognize an individual and collective right to democratic rule. It has become abundantly clear, moreover, that the principle is supported by contemporary state practice.³⁴ Professor Thomas Franck's findings are well-known and I am content to rest on them here. I will briefly discuss, however, two precedents: the International Court of Justice's discussion of democracy in the *Nicaragua Case* and the resolution on democracy adopted by the United Nations General Assembly.

In spite of some remarkable precedents, the principle of democratic rule has been slow to make headway as a universally accepted principle,

& PUB. AFF. 205, 213 (1983); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs* (Part 2), 12 PHIL. & PUB. AFF. 323 (1983).

33. See, e.g., G.A. Res. 2625, *supra* note 2, at 123 ("Every State has an inalienable right to choose its political . . . system . . .").

34. See generally Fox, *supra* note 28; see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

until recently.³⁵ The main reason, was, of course, the Cold War. The uncertainty and ambivalence of the principle of democratic rule during the Cold War years was demonstrated by the International Court of Justice as recently as 1986.³⁶ The Court, while accepting that a state may bind itself by treaty or other formal commitment to hold free elections, held that every state "is free to decide upon the principle and methods of popular consultation," this being part of a "fundamental right to choose and implement its own political, economic, and social systems."³⁷ This includes the "freedom" to be undemocratic, which was precisely the issue the Court was addressing. If other states suspect that a country is sliding toward totalitarianism, according to the Court, there is not much they can do, because "adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the principle of state sovereignty."³⁸ As I have argued elsewhere, the Court's position is indefensible today.³⁹ Its rejection of the principle of democratic rule in the Americas was outdated even in 1986; it is bad *general* international law in 1996. Whatever the other merits of the decision, the Court's discussion of democracy in the *Nicaragua Case* should be buried along with other Cold War relics.

In the United Nations, the movement toward recognition of democratic rule was cautious but unmistakable. On February 21, 1991, the General Assembly adopted Resolution 45/150, entitled "Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections."⁴⁰ While this resolution still reflects some of the ambivalence associated with the tension between sovereignty and human rights, it is an important document. The resolution reaffirms the Universal Declaration of Human Rights. It provides, albeit vaguely, that "everyone has the right to take

35. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967); and its Optional Protocol, opened for signature Dec. 19, 1966, art. 1, 999 U.N.T.S. 302. Under the Optional Protocol, the Human Rights Committee held that Uruguay's military regime was in violation of Article 19(2) of the Covenant (which states that everyone shall have the right to freedom of expression, including the freedom to seek, receive, and impart information) when it denied a petitioner the right to freely engage in political and trade union activities. *Alba Pietrorria v. Uruguay*, Communication R. 10/44, Report of the Human Rights Committee, 36 U.N. GAOR, 36th Sess., Supp. No. 40, at 153-59, U.N. Doc. A/46/40 (1981). The other important Cold War precedent is also found in the Americas. It is the historical resolution by the Council of Ministers of the Organization of American States in 1979 declaring the illegality of the Somoza regime in Nicaragua and calling for its immediate replacement. For this and further examples, see Franck, *supra* note 34, at 62-65.

36. See *Nicaragua Case*, *supra* note 5.

37. *Id.* at 131.

38. *Id.* at 133.

39. See Tesón, *supra* note 14.

40. G.A. Res. 150, U.N. GAOR, 45th Sess., at 457-59, U.N. Doc. A/RES/45/150 (1991).

part in the government of his or her country." More fundamentally, it affirms that "the will of the people shall be the basis of the authority of government[,]" and that "this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." This very specific and detailed content of the principle of democratic rule is reiterated throughout the resolution.

The resolution, however, also warns that these efforts to enhance democracy "should not call into question each State's sovereign right freely to choose and develop its political, social, economic, and cultural systems, whether or not they conform to the preferences of other states." Members have a duty, according to the resolution, to respect the "decisions taken by other states in freely choosing and developing their electoral institutions." The word "freely" in this context seems to mean "free from *foreign* coercion," and not necessarily "free from *domestic* coercion." How can this statement be squared with the requirement of democracy and free elections? While on the one hand a state has the right to choose its own political system without interference from other states, on the other hand it seems obvious that under the terms of the resolution a state cannot "freely choose" to be undemocratic, even though an undemocratic regime is a "political system."

The way to reconcile these two parts of the resolution is this: the "sovereignty" limitation contained in this resolution refers to the need to tolerate a diversity of *actual electoral procedures* in the domestic practice of members. The core of the principle remains intact, however: states have an obligation to make sure that governments are elected by the people in free elections. Many electoral systems and methods are compatible with this principle, but an undemocratic regime is not. Thus a state cannot validly choose an undemocratic regime or tyranny.

To summarize: There can be little doubt that a principle of democratic rule is today part of international law. While in a universal context the recognition of the principle has only had the effect of subtracting the question of democratic rule from the exclusive jurisdiction of states, the nations in Europe and the Americas have elevated the principle of democracy to the category of a rule which is fully enforceable through appropriate regional collective mechanisms.⁴¹

41. I do not pass judgment here on the *unilateral* enforcement of democracy (the cases of Grenada and Panama are possible examples). See generally TESÓN, *supra* note 3. But those precedents, especially when added to the Haitian case, at the very least reinforce the proposition that democratic rule is no longer part of the domestic jurisdiction of states.

III. COLLECTIVE HUMANITARIAN INTERVENTION

A. General Principles

In recent years, international lawyers have debated the legitimacy of using force to remedy serious human rights violations, a practice also known as humanitarian intervention.⁴² Some writers reject the legitimacy of humanitarian intervention altogether, whether it is collective or unilateral.⁴³ For these authors, the intent of the intervenor is irrelevant, as are the *degree* of human rights violations and the attitude of the victims themselves — that is, whether the intervention is the product of a unilateral decision by the intervenor, or instead requested by the citizens of the target state. According to these authors, armed intervention for humanitarian purposes is flatly prohibited.

Undeniably, the anti-interventionist position has the support of traditional state-centric conceptions of international law and relations.⁴⁴ It is also informed by the commendable moral purpose of reducing the permissible instances of war and containing armed conflict. This extreme position cannot be maintained today. The content and purpose of state sovereignty have undergone profound changes since 1945, and more dramatically since 1989. Human beings have claims against their own states and governments that the international community cannot merely ignore. While war ought to be the remedy of last resort to redress human rights violations, there are some, admittedly rare, serious cases of human rights deprivations where a strong case can and should be made for forcible intervention authorized by the international community or even by individual states. Whether these cases should be viewed as extreme instances of "moral catastrophe" and thus *outside* the law, or whether they are instead genuine exceptions to the legal prohibition is a jurisprudential preference to which little weight ought to be attached. I cannot see much consequence to the proposition that an act is illegal but morally

42. For those who argue against humanitarian intervention, see TESÓN, *supra* note 3, at 128 n.5. For those who argue for humanitarian intervention, see *id.*, at 129 n.7.

43. See, in addition to authors referenced *supra* note 42, Lori F. Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 215, 217–21 (Lori F. Damrosch & David J. Scheffler eds., 1991); Louis Henkin, *The Use of Force: Law and U.S. Policy*, in LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 41–44 (2d ed. 1991).

44. See, e.g., Thomas Oppermann, *Intervention*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 233, 235 (Rudolf Bernhardt ed., 1987) ("[T]he *raison d'être* of the non-intervention rule is the protection of the sovereignty of the State.").

permitted, or obligatory,⁴⁵ as contrasted with the proposition that the act is legally permitted, or obligatory, in those rare instances. This is so because moral reasons are overriding. If anti-interventionists can agree on the kind of cases where the international community morally can or must intervene, their protests that the intervention is nevertheless illegal do not enjoy much credibility.

State practice since 1945 demonstrates that states have a right to intervene forcibly to put an end to serious human rights violations.⁴⁶ Yet, here I wish to concentrate exclusively on *collective* humanitarian intervention. In more technical terms, the question is whether the Security Council may authorize Article 42 measures to put an end to serious, or extreme, human rights violations. Some writers who are hostile to the legitimacy of unilateral action concede that the legal situation changes when the humanitarian intervention is authorized by the United Nations or an appropriate regional body.⁴⁷ This support for multilateral action may be prompted by the feeling that if a coercive action is authorized by some kind of formal international *process*, such as voting by the Security Council, then it acquires a legality which it would lack if the decision to intervene were left to national governments acting unilaterally. Alternatively, they may think that collective humanitarian intervention is more apt to curb the danger of abuse posed by unilateral intervention.⁴⁸ More technically, some may argue that the Security Council, unlike individual states, has absolute discretion in deciding when to authorize the use of force. According to this view, the Security Council *determines* the existence of a breach of the peace, threat to the peace, or act of aggres-

45. An example of this position is Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991) (while sympathetic to intervention in cases of brutal repression, the U.N. Charter does not authorize unilateral humanitarian intervention).

46. See TESÓN, *supra* note 3, at ch. 8.

47. See, e.g., Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1993); Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 43, at 202, 208. While reluctantly believing that unilateral humanitarian intervention is banned by the U.N. Charter, Tom Farer has a more sympathetic view of collective humanitarian intervention. See, Farer, *supra* note 45; see also Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 43, at 185, 191, 198-99.

48. See, e.g., Nancy D. Arnison, *International Law and Non-Intervention: When do Humanitarian Concerns Supersede Sovereignty?*, 17 FLETCHER FORUM WORLD AFF. 199, 201 (1993) (collective humanitarian intervention preferable to unilateral action, although collective action may also suffer from potential for abuse and mixed motives); Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120 (1993) (an inherent problem with unilateral intervention is that it may be done for self-interest or political gain, although this may be more closely monitored by modern technology).

sion under Article 39 of the U.N. Charter. Therefore, if the Security Council authorizes enforcement measures in a case of serious human rights deprivations, it has determined that the situation qualifies under Article 39 as the kind of situation which *is* a breach of the peace.⁴⁹

Anti-interventionists disagree. They argue that under Article 39 the Security Council can only authorize collective forcible action in cases of threat to the peace, breach of the peace, and acts of aggression.⁵⁰ Serious human rights violations, even genocide, do not constitute aggression or threat or breach of the (international) peace if contained within state borders. In addition, anti-interventionists deny absolute discretion to the Security Council in this regard. For them, the Security Council is subject to standards imposed by the U.N. Charter and cannot lawfully overstep those constraints.⁵¹ Unless a violation of human rights threatens international peace, the Security Council does not have the power to authorize forcible action. At most, these authors argue, the Security Council can criticize the dictatorial government and demand peremptorily that the violations cease. Such a demand will be legally binding under Article 25. The Security Council can even authorize *hard* intervention, such as economic or other sanctions, by members against the outlaw state.⁵² But these authors maintain that the Security Council may not authorize the use of force.

The first question is whether the Security Council has complete discretion to interpret Article 39 and thus authorize the use of force without being formally constrained by the language of that article. Those who respond in the affirmative say that what the Security Council says is a breach of the peace *is* legally a breach of the peace. This position, however, must be rejected. The Security Council, like any other United Nations organ, is bound by the principles, rules, and standards set forth in the U.N. Charter. Its actions, therefore, are subject to legal scrutiny,

49. See, e.g., PETER MALANCZUCK, *HUMANITARIAN INTERVENTION AND THE LEGITIMACY OF THE USE OF FORCE* 25 (1993) (decision on what constitutes "threat to peace" a political one subject to Security Council's discretion).

50. See, e.g., Theodor Meron, *Commentary on Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 43, at 212, 212-13. In the same volume, Professor Damrosch finds the arguments for collective humanitarian intervention stronger than those for unilateral action, but still not free from doubt. See Damrosch, *supra* note 43, at 219.

51. This was the position taken by Libya in the *Lockerbie Case*. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 126 (Provisional Measures Order of Apr. 14), *reprinted in* 31 I.L.M. 665, 671 (1992) [hereinafter *Lockerbie Case*].

52. This was the case of Haiti before resolution 940. There the Security Council imposed economic sanctions under Article 41. The Haiti case is fully discussed below. See *infra*, part III.D.

both substantively and procedurally.⁵³ Those who vindicate the absolute discretion of the Security Council confuse two different meanings of discretion.⁵⁴ One meaning of discretion arises when an official's decision, authorized by law, is not subject to review by a higher body. This is a *weak* meaning of the word "discretion," because it does not presuppose that the law lacks standards to guide the official's decision. That decision is perhaps non-reviewable, but it may not be lawless; it is controlled by substantive legal standards. The second meaning of discretion is that the official's decision is not guided by any standards, that he has absolute power to decide one way or the other, unconstrained by law (except, of course, by the rule of competence that empowered *him* as the legitimate authority). This is discretion in a *strong* sense, because it conceives of the official as deciding the case anew, as creating fresh law. The difference between the two is very important. In the first case the official's decision is vulnerable to the criticism that he applied the law incorrectly, that the decision is legally wrong. In the second case, however, the official is not open to the criticism that he misapplied the law, because the official's decision is not substantively constrained. He is deemed to be authorized to create fresh law for the case.

It is reasonable to suppose that under the Charter, the Security Council enjoys, at most, discretion in the first, weak, sense. Under the Charter, neither the General Assembly nor the International Court of Justice have original or plenary jurisdiction to review the decisions of the Security Council.⁵⁵ But the Security Council has no discretion in the strong sense. Its decisions *are* constrained by international law, in particular by the U.N. Charter, and thus subject to the judgment of legality by governments and international lawyers generally, even if its decisions are not formally subject to review. Anti-interventionists are right, therefore, in rejecting the view that the Security Council can decree a collective intervention for any reason. There *is* a substantive law of collective use of force, and the Security Council is just as bound to comply with it as anybody else.

53. For a general discussion of the legitimacy of the Security Council decisions (mostly from a procedural standpoint), see David J. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993).

54. The discussion that follows is taken from the seminal work by RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-39 (1978).

55. Although, as the *Lockerbie Case* demonstrates, the International Court of Justice may, in appropriate cases, be called to pass upon the legality of the Security Council's actions. See *Lockerbie Case*, *supra* note 51, at 126-27 (ruling only that Security Council decisions prevail over contrary treaty obligations by virtue of Article 103 of the Charter; thus not excluding the possibility that the Council may act *ultra vires*).

Simply echoing the uncontroversial proposition that human rights are no longer part of the exclusive domestic jurisdiction of states is not an effective response to anti-interventionists.⁵⁶ Anti-interventionists rightly respond that this affects *soft* and perhaps even hard intervention. They happily concede that United Nations organs, including the Security Council, may address human rights issues, and even condemn states for their human rights abuses, *as long as no use of force is involved*. They correctly point out that the collective use of force is subject to *independent* constraints, which are to be found in Chapter VII. Thus, Article 39, and not the chameleon Article 2(7), is the right place to look when evaluating the legitimacy of collective *forcible* intervention.⁵⁷

A complete answer to the anti-interventionist view draws from text, morality, history, and practice. There is some textual support in the Charter for the legitimacy of humanitarian intervention.⁵⁸ The Preamble declares that armed force should not be used "save in the common interest," and there is no reason to assume that the common interest excludes the interest in upholding human rights, particularly since the "Peoples of the United Nations" reaffirm "faith in fundamental human rights [and] in the dignity and worth of the human person" in the Preamble itself.⁵⁹ The Preamble also states the United Nations' determination "to establish conditions under which . . . justice . . . can be maintained." It would be a very narrow definition of justice indeed which would not include human rights in any context — let alone in this one — where human rights are one of the pillars of the organization.

In addition, the anti-interventionist's reading of Article 39 and Chapter VII is too narrow, and not supported by United Nations and state practice.⁶⁰ Subsequent practice under the Charter, if unchallenged on the whole, may determine the more precise meaning of the words in the Charter.⁶¹ Admittedly, the language drafted almost fifty years ago limits the authorization of forcible action to cases of threat or breach of the (international) peace or acts of aggression. This limitation can be easily understood in historical terms, since the possibility of genuine collective action to respond to and prevent aggression was already a revolutionary step.

56. See, e.g., Judy A. Gallant, *Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of A Changing World Order*, 7 AM. U. J. INT'L L. & POL'Y 881 (1992).

57. See MALANCZUK, *supra* note 49, at 25.

58. I have argued that the text of the Charter is inconclusive on this issue. See TESÓN, *supra* note 3, at ch. 7. I draw from that discussion.

59. See *id.* at 133.

60. See *infra* part III.B-F.

61. A well-known example is, of course, the voting practice in the Security Council.

The legitimacy of collective humanitarian intervention in appropriate cases flows from an interpretation of the U.N. Charter that looks, beyond the letter, to the purposes and principles that animate, shape, and define legitimacy in the international community today. I am not suggesting one play verbal games on this very important issue. Indeed, it is always possible to *define* serious human rights violations as a *breach of the peace* and thus trigger enforcement action under Article 39. I am suggesting that the substantive law of the Charter has now evolved to include human rights as a centerpiece of the international order, and cases of *serious* human rights violations as situations that *may* warrant collective enforcement action. This imperative prevails over unrestrained state sovereignty, and may be enforced by the Security Council, acting on behalf of the international community, in rare cases of serious human rights violations where other means have failed or are certain to fail. There are, of course, cases where even anti-interventionists would agree that serious violations of human rights can trigger enforcement action, namely, where those violations *do* constitute a "threat to the peace."⁶² This happens quite often, as in the cases of South Africa or Iraq's treatment of the Kurds.⁶³ As a consequence, it is possible to argue that the basis for collective humanitarian intervention is the threat to peace, and not the gravity of the human rights violations. In this view, the United Nations has a right to intervene only when human rights deprivations cause international effects.⁶⁴ Presumably, genocidal action is beyond the reach of the Security Council's action when it is purely internal, that is, its effects are contained within a state's borders.

There is no practical problem with the Security Council actually invoking the language of Article 39 when deciding to authorize humanitarian intervention. In my view, the crucial question is what the Security Council *does*, not what it *says*. Suppose there are massive human rights violations and the Security Council decides to intervene. When doing so, it uses the "threat to the peace" or "breach of the peace" language of Article 39. Let us suppose this becomes an institutional habit. It is intolerably formalistic to cling to the view, on these facts, that the Security Council is *not* authorizing humanitarian intervention, when a commonsense reading of the situation by any unprejudiced observer will

62. See, *inter alia*, Kartashkin, *supra* note 47, at 218.

63. See *infra* part III.B.

64. See, e.g., Nigel S. Rodley, *Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework*, in *TO LOOSE THE BANDS OF WICKEDNESS*, *supra* note 3, at 14, 28, 40 (although winds may be blowing in direction of collective humanitarian intervention, threat to international peace will probably be required).

indicate that that is precisely what the Security Council is doing. The better interpretation is that, regardless of the language in which it cloaks its decision, the Security Council authorizes the use of force in two instances: to counter aggression and restore peace, and to remedy serious human rights abuses. In both situations, the Security Council will authorize the use of force only in rare and extreme cases where everything else has proved ineffective or unavailable.

Moreover, the anti-interventionist position is peculiarly blind to history. The United Nations was created as a response to the horrors caused by one of the most tyrannical regimes in modern history. The Second World War was in part a humanitarian effort. It is therefore surprising to be told that the very crimes that prompted the massive, cruel, and costly struggle from which the United Nations was born, are now immune from action by the organ entrusted to preserving the fruits of the hard-won peace. The formalism of anti-interventionists thus not only rewards tyrants, but it betrays the purposes of the very international order that they claim to protect. Some may find the concerns of the anti-interventionist persuasive enough to severely limit or reject the lawfulness of unilateral humanitarian intervention. But those concerns have little force against humanitarian intervention properly authorized by the United Nations Security Council.

The reasons of political philosophy that support the legitimacy of humanitarian intervention are many and complex, and I have discussed them elsewhere at length.⁶⁵ The central point is that states derive their legitimacy and their sovereignty from popular consent and the protection of basic human rights. The purpose of states is to protect human rights in the first place. Therefore, governments forfeit their legitimacy in the international arena when they turn against their citizens and betray the ethical end that justifies their existence. In some cases, therefore, forcible humanitarian intervention is morally permitted, although subject to several constraints. These reasons gain in strength when the intervention is collective, for in that case a number of concerns about intervention are assuaged — in particular the concern about the dangers of unilateral abuse.⁶⁶

65. See TESÓN, *supra* note 3, at Part One.

66. See, e.g., Lee H. Hamilton, *When It's Our Duty to Intervene*, WASH. POST, Aug. 9, 1992, at C2 ("multilateral consideration would guard against aggression, prevent hasty or capricious intervention and enhance the effectiveness of subsequent action").

B. The Case of Iraq's Treatment of the Kurds, 1991

These textual, historical, and moral arguments are validated by recent practice. On August 3, 1990, armored and mechanized units from the Iraqi Army's Republican Guard divisions invaded and occupied the neighboring nation of Kuwait. In early 1991 the Security Council authorized the use of force to terminate Iraq's occupation of Kuwait. While rather unique in its scope and intensity, the collective military action taken by United Nations member states in "Operation Desert Storm" can be addressed within the traditional interpretation of the principles set forth in Articles 39, 41 and 42 of the U.N. Charter.

During the coalition military campaign President George Bush had publicly expressed optimism that Iraqi citizens would "take matters into their own hands" and remove Saddam Hussein from power.⁶⁷ The crushing defeat of the Iraqi Army in and around Kuwait, and public exhortations from foreign leaders to throw off Saddam Hussein's rule, reignited long-simmering desires for independence among Kurds living in Northern Iraq.⁶⁸ Although the Iraqi Army was no match for the allied coalition, it proved more than effective at suppressing the Kurdish revolt. Iraqi army troops and helicopter gunships relentlessly attacked Kurdish villages, forcing two million civilians to flee into the countryside. Almost one million of these Kurds fled north, through the mountains, in an attempt to reach safety in Turkey.⁶⁹

On April 5, 1991, as atrocities committed by the Iraqi government against the Kurds and others mounted,⁷⁰ the Security Council adopted

67. RICK ATKINSON, *CRUSADE: THE ALLIED VICTORY IN THE PERSIAN GULF* 303 (1993).

68. Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 INT'L J. REFUGEE L. 4, 5-7 (1992). Kurds constitute 23-27 percent of the Iraqi population and are concentrated in the northern area of Iraq. Conflict between Arabs and Kurds in Iraq is decades old. For example, a Kurdish revolt occurred in 1974 when a 1970 autonomy agreement between Iraqi Kurds and Saddam Hussein's Ba'th regime broke down. The rebellion was finally crushed by Saddam Hussein in 1975 at a cost of 50,000 killed. Guerilla warfare resumed in the 1980s, however, and after the Iran-Iraq war ended in 1988, the Iraqi army killed thousands of Kurdish nationalists and used poison gas against the population of the Kurdish village of Hallabja. *Id.*

69. *Id.* at 7.

70. See Kevin McKiernan, *Kurdistan's Season of Hope*, L.A. TIMES MAG., Aug. 23, 1992, at 28; Jonathan C. Randal, *Against All Odds: Resistance to Saddam*, WASH. POST, Apr. 7, 1991, at A1. More recent evidence suggests that Iraq continues to violate this Resolution, inflicting serious human rights violations against the Shiite Muslim civilians in southern Iraq, as well as continuing to attack the Kurds in the north. Art Pine & Robin Wright, *U.N. Aide Cites "Serious" Violations of Human Rights in Southern Iraq*, L.A. TIMES, July 31, 1992, at A6. In addition, confiscated Iraqi materials have provided comprehensive documentation of massive human rights violations. Thorough paper, audio, and film records of interrogations, torture sessions, and executions detail atrocities perpetrated by the Iraqi government. See, e.g.,

Resolution 688, initially proposed by France, by a vote of 10–3 with 2 abstentions.⁷¹ In that document, the Security Council first condemned “the repression of the Iraqi civilian population in many parts of Iraq,” and demanded that “Iraq . . . immediately end this repression.” The Security Council further urged Iraq to “allow immediate access by international humanitarian organizations,” and appealed to “all member States . . . to contribute to these humanitarian relief efforts.”⁷² The Security Council also *demand*ed that Iraq cooperate with the Secretary-General toward these ends.

The Security Council added several provisos linking the resolution to the language of Article 39, perhaps to make sure that its action was consistent with its powers under the Charter. In particular, the resolution stated that these human rights violations had consequences “which threaten[ed] international peace and security in the region.” It characterized the requested Iraqi compliance with its human rights demands as “a contribution to international peace and security in the region.” Resolution 688 contained in its preamble a rare reference to Article 2(7) of the Charter. Anti-interventionists may easily claim that Resolution 688 was a lawful Security Council action in response to a “threat to the peace,” and thus well within the traditional paradigm of aggression. This conclusion is excessively formalistic. The relevant issue is not whether the Security Council can do anything it wants, as long as it styles it a “threat to the peace.” Aside from word games, this still is a human rights issue about Iraq’s treatment of its own citizens. A reasonable interpretation of Resolution 688 is that the Security Council was centrally concerned with the human rights violations themselves, and the reference to the threat to peace and security was added for good measure.

When Turkey resisted international appeals to provide aid and sanctuary for the one million starving and freezing refugees along its border with Iraq, the United States, Britain, and France announced that

Tom Hundley, *Iraq Plotted Genocide of Kurds*, CHI. TRIB., Apr. 1, 1992, at 1; Amy Kaslow, *Documents Give Evidence of Atrocities Against Iraqi Kurds*, CHRISTIAN SCI. MONITOR, June 10, 1992, at A1; Jeanne Kirkpatrick, *It is Appropriate to Speak of Genocide*, WASH. POST, Mar. 2, 1992, at A17; Jonathan C. Randal, *Iraqi Files Point to Mass Deaths*, WASH. POST, Feb. 22, 1992, at A1. A report by Max Van der Stoep, special United Nations investigator, tells of arbitrary executions of individuals, families, whole villages; of arbitrary arrests and unspeakable tortures, including electric shocks, burnings, beatings, rapes, and extractions of teeth and nails. *Report on the Situation of Human Rights in Iraq*, U.N. Commission on Human Rights, 48th Sess., Agenda Item 12, at 12–30, U.N. Doc. E/CN.4/1992/31 (1992).

71. S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/688 (1991). See generally Gallant, *supra* note 56; see also Rodley, *supra* note 64, at 28–34; David J. Scheffer, *Toward A Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 (1992).

72. S.C. Res. 688, *supra* note 71.

they would undertake a humanitarian relief effort to assist the Kurds. These states interpreted the term "humanitarian organization," referred to in Resolution 688, to include military forces with the limited and specific mission of humanitarian assistance. Dubbed "Operation Provide Comfort," the relief effort greatly expanded as the scope of the refugee problem in northern Iraq and southern Turkey became known. An initial count found 452,000 refugees in ten major and thirty to forty smaller camps along the Iraq-Turkey border. Disease, starvation, and freezing temperatures led to an increasing mortality rate among those seeking sanctuary in Turkey.⁷³ Estimates of deaths from starvation and exposure among Kurdish refugees fleeing north were in the range of 1,000 per day during this period.⁷⁴

As Kurdish refugees made clear their fear of returning to Iraq without assurances of safety, the governments involved in Operation Provide Comfort decided it was necessary to establish protected "safe havens" inside northern Iraq in order to entice Kurdish refugees to return from the border area with Turkey.⁷⁵ On April 12, 1991, U.S. Army Lieutenant General John M. Shalikashvili met with Iraqi General Nashwan Tagoon and told him to remove all Iraqi ground forces to locations south of the thirty-sixth parallel and to cease all air operations north of the parallel or risk the potential use of allied offensive military force. By the next day, elements of the U.S. Twenty-fourth Marine Expeditionary Unit and the Tenth Special Forces Group had been airlifted into the town of Zakhu in northern Iraq to secure the surrounding area and prepare for the construction of refugee repatriation camps. Iraqi military and government officials quickly ceded control over the area to the intervention force.

Within weeks of the passage of Resolution 688, thirteen nations had sent almost 30,000 military and civilian personnel to participate in the relief mission. U.S. forces numbered 18,285, while other states contributed an additional 10,962 personnel.⁷⁶ Military forces were not the only participants in the operation. Thirty states contributed relief supplies and fifty non-governmental organizations (NGOs) either offered assistance or

73. Michael E. Harrington, *Operation Provide Comfort: A Perspective in International Law*, 8 CONN. J. INT'L L. 635, 644 (1993).

74. See Patrick Tyler, *U.S. Scouting Refugee Sites Well Inside Iraq's Border*, N.Y. TIMES, Apr. 10, 1991, at A1.

75. Harrington, *supra* note 73, at 644-45.

76. *Id.* at 645. The other nations who provided military forces to assist in Operation Provide Comfort included: Australia (75), Belgium (155), Canada (120), France (2,141), Germany (221), Italy (1,183), Luxembourg (43), Netherlands (1,020), Portugal (19), Spain (602), Turkey (1,160), and United Kingdom (4,192).

participated in the operation. On May 13, 1991, General Shalikashvili turned control of the operation over to the United Nations High Commissioner for Refugees,⁷⁷ and by July 15, 1991, the last allied troops had been withdrawn to Turkey and replaced by United Nations refugee officials and security forces,⁷⁸ pursuant to an agreement between the United Nations and Iraq.⁷⁹

While the decision to operate with military forces within Iraqi territory was considered necessary to avert a large-scale human disaster, Operation Provide Comfort's expansion was not completely accepted as legitimate in the international community. For instance, early on, Secretary-General Javier Perez de Cuellar warned that the planned intervention would require approval by the Security Council and the Iraqi government, noting that it posed a clear legal problem, even if there was no difficulty from a moral point of view.⁸⁰

Although the Secretary-General may have had initial reservations about the scope of the humanitarian mission in northern Iraq, his September 1991 final report to the General Assembly argued forcefully for a change in the traditional view of state sovereignty in view of the universal international interest in responding to human rights emergencies:

[Protection of human rights] now involves more a concerted exertion of international influence and pressure . . . and, in the last resort, an appropriate United Nations presence, than what was regarded as permissible under traditional international law.

It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity

We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights. . . . What is involved is not the right of intervention but the collective obligation of States to bring relief and redress in human rights emergencies.⁸¹

77. *Id.* at 646.

78. John M. Brown, *Last Allies Pull Out of North Iraq*, FINANCIAL TIMES (London), July 16, 1991, at 6.

79. *Security Force Pact is Settled With Iraq, Official at U.N. Says*, N.Y. TIMES, May 24, 1991, at A8.

80. See Stephen Robinson, *The Middle East: Bush and U.N. Chief Clash Over Legality of Military Move*, DAILY TELEGRAPH, Apr. 18, 1991, at 10.

81. *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 46th Sess., Supp. No. 1, at 5, U.N. Doc. A/46/1 (1991).

Perez de Cuellar's admission that state sovereignty must occasionally yield to human rights concerns was an important step for the United Nations in accepting humanitarian intervention as a principle of international law. When the Secretary-General further notes that "the defense of the oppressed in the name of morality should prevail over frontiers and legal documents,"⁸² it becomes increasingly apparent that the official United Nations view of state sovereignty underwent significant reevaluation in light of the Gulf War and Operation Provide Comfort.

Anti-interventionists argue that the Security Council resolution did not authorize *forcible* measures in the Kurdish crisis, but only non-forcible humanitarian relief action.⁸³ Once more, this is just blind adherence to words on paper. While apparently referring to non-forcible intervention, the context of this resolution reveals that the United Nations effort relied upon a number of factors which demonstrate that actual or potential forcible action was contemplated. As David Scheffer has shown, those factors were: allied military intervention in northern Iraq in its efforts to create a security zone; allied threats to respond to any Iraqi operations; the deployment of a United Nations force to protect humanitarian relief efforts; and the existence of an agreement with Iraq that contemplated the possible use of force in case of noncompliance.⁸⁴ In the light of these facts, it is hard to avoid the conclusion that this was a genuine case of collective humanitarian intervention.

Another strategy to justify Resolution 688 within the old paradigm of aggression, that is, without introducing the concept of humanitarian intervention, is to claim that Resolution 688 was adopted in the context of the series of Security Council resolutions directed at countering Iraqi aggression. In this view, the action authorized by the Security Council to protect the Kurds was simply an extension of the enforcement measures authorized to counter aggression.⁸⁵ Resolution 688 would thus be analogous to Resolution 687, which authorized a sweeping range of measures regarding the disarming and denuclearization of Iraq — matters that normally would fall under its exclusive jurisdiction. The argument is that the "intervention" to protect the Kurds is justified *because* it is a sequel to Chapter VII action, which is itself justified as a response to Iraqi aggression.

82. R.C. Longworth, *End of Sovereignty: Nations' Internal Affairs Now the World's Business*, CHI. TRI., Sept. 19, 1993, § 4 at 1, 4.

83. See, e.g., MALANCZUK, *supra* note 49, at 18.

84. See Scheffer, *supra* note 71, at 268.

85. See, e.g., Mary E. O'Connell, *Commentary on International Law: Continuing Limits on U.N. Intervention in Civil War*, 67 IND. L.J. 903, 907-08 (1992) (arguing that Resolution 688, together with Resolution 678, gave coalition members the authority to use "all necessary means" to secure peace in the area that included the Kurdish region).

This interpretation is highly contrived. The Iraqi government perpetrated at least two distinct violations of international law: the attack against Kuwait (a violation of Article 2(4) which triggers Security Council action under Chapter VII); and a massive violation of the human rights of individuals in Iraq, most notably the Kurds. Resolution 688, by its very terms, was addressed to the latter. Not only did the resolution peremptorily demand that Iraq stop the repression; it authorized non-consensual relief measures. Moreover, from the fact that the Security Council decreed mandatory disarmament of the defeated aggressor (thus instituting coercive measures on matters that would normally fall within the exclusive jurisdiction of Iraq) it does not necessarily follow that the Security Council had the authority to institute coercive measures on *any* matter that would normally fall within Iraq's exclusive jurisdiction. In other words, Resolution 688 does follow logically from the previous resolutions of the Security Council (especially from Resolution 687 authorizing the use of force as a response to Iraq's refusal to withdraw from Kuwait.) But we need the humanitarian intervention standard *in addition* to the "breach of the peace" standard to justify Resolution 688.

C. *The Operation in Somalia, 1992-93*

On December 3, 1992, the Security Council unanimously passed Resolution 794, authorizing a U.S.-led military force to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."⁸⁶ The Somali crisis was touched off by the power vacuum created when President Mohammed Siad Barre, the country's longtime dictator, fled the capital city of Mogadishu in January 1991.⁸⁷

Barre's departure split the opposition. As various clan militias turned on one another, the country was effectively divided into 12 zones of control. A so-called "reconciliation conference" between the warring factions was held in Djibouti in July 1991 resulting in the selection of Omer Arteh Qhalib as interim Prime Minister. In reality, however, Qhalib held no perceptible authority over the Somali faction leaders. By November 1991, the struggle between the warring factions had escalated to a full-scale civil war.

On January 11, 1992, Qhalib sent a letter to the Security Council requesting an immediate meeting to address the rapidly deteriorating

86. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., at 3, U.N. Doc. S/RES/794 (1992).

87. See Don Oberdorfer, *The Path to Intervention*, WASH. POST, Dec. 6, 1992, at A1, A35. The brief account that follows is borrowed from Jeffrey Clark, *Debacle in Somalia*, 72 FOREIGN AFF. 109 (1993).

security situation in Somalia.⁸⁸ In response to Qhalib's letter, the Security Council passed a series of resolutions citing Chapter VII of the U.N. Charter as the basis for United Nations action and implying that an Article 39 justification for collective military action could be invoked in the future. The Security Council imposed a complete weapons embargo on Somalia in January 1992.⁸⁹ In April 1992, the United Nations Operation in Somalia (UNOSOM) was established and fifty United Nations observers were sent to monitor a widely-ignored cease-fire among the factions.⁹⁰

In the summer of 1992, the warring factions in Somalia continued to disrupt desperately needed relief supplies. The Security Council passed increasingly aggressive resolutions, eventually asserting in Resolution 767 that "the situation in Somalia constitutes a threat to international peace and security."⁹¹ In late August, the Security Council passed Resolution 775, which approved airlifts of humanitarian aid and supplemented UNOSOM personnel levels with a battalion of Pakistani troops to assist in relief supply distribution efforts.⁹²

The collapse of all governmental authority, combined with drought and the continuation of traditional clan and sub-clan warfare, led to a situation of mass starvation.⁹³ Although the United States supplied food aid through the International Committee of the Red Cross (ICRC) and private voluntary relief organizations, it is estimated that upward of three-quarters of the United Nations food supplies were confiscated or stolen by the various factions for their own use or to sell for profit.⁹⁴ By September 1992, tons of undistributed food were piling up at the Mogadishu airport and waterfront, but the ICRC estimated that 1.5 million Somalis faced imminent starvation, and three times that number were already dependent on external food assistance.⁹⁵

88. *Letter Dated 20 January 1992 From the Charge D'Affaires A. I. of the Permanent Mission of Somalia to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., U.N. Doc. S/23445 (1992).

89. S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg., at 2, U.N. Doc. S/RES/733 (1992).

90. S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., at 2, U.N. Doc. S/RES/751 (1992).

91. S.C. Res. 767, U.N. SCOR, 47th Sess., 3101st mtg., U.N. Doc. S/RES/767 (1992).

92. S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg., U.N. Doc. S/RES/775 (1992).

93. See Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 204, 207, 213 (Lori F. Damrosch ed., 1993).

94. Carla A. Robbins et al., *Waiting for America*, U.S. NEWS & WORLD REP., Dec. 7, 1992, at 26.

95. See Herman J. Cohen, *Somalia: U.S. Relief Efforts*, in 6 U.S. DEP'T ST. DISPATCH 713 (Sept. 21, 1992).

In late November, 1992, Secretary-General Boutros-Ghali reported numerous violations of humanitarian law against United Nations relief workers, including attacks on the Pakistani troops and the shelling of a World Food Programme ship as it attempted to enter the port of Mogadishu.⁹⁶ On November 25th, 1992, U.S. Secretary of State Lawrence Eagleburger conveyed an offer to lead a multinational force into Somalia to implement the Security Council's resolutions to Secretary-General Boutros-Ghali.⁹⁷

One week later, the Security Council passed Resolution 794; within days 24,000 U.S. troops had arrived in Somalia to establish, in the words of the Resolution, "a secure environment for humanitarian relief operations" as part of Operation "Restore Hope."⁹⁸ The distribution of relief supplies went exceedingly well according to most reports, and several hundred thousand Somalis, who otherwise would have perished, managed to survive.⁹⁹ On May 4, 1993, the United States formally turned the operation over to the United Nations.

The operation in Somalia took a turn for the worse, however, when the United Nations mandate expanded to include "nation-building" projects such as disarming the factions and arresting recalcitrant or uncooperative faction leaders.¹⁰⁰ One particular raid turned deadly when U.S. Army Rangers and Special Forces soldiers attempted to protect the crew of a downed U.S. helicopter pilot in a neighborhood controlled by one of the factions. Eighteen U.S. soldiers died in the ensuing firefight and 75 were wounded before U.N. armored units could come to their rescue.¹⁰¹ In another incident, several dozen Pakistani troops were ambushed and killed by gunmen firing automatic weapons while screened by women and children. In all, one hundred U.N. peacekeepers died during the operation.¹⁰²

Unwilling to sustain additional casualties, the United States withdrew its forces from Somalia in March 1994, and the U.N. mission's scope contracted to its original focus on food relief and distribution. UNOSOM was unable to bring about the formation of a government in Somalia, and was subjected to increasing hostility from the populace and the factional

96. Letter Dated 24 November 1992 From the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 47th Sess., U.N. Doc. S/24859 (1992).

97. David Binder, *Bush Ready to Send Troops to Protect Somalia Food*, N.Y. TIMES, Nov. 26, 1992, at A1.

98. S.C. Res. 794, *supra* note 86.

99. See, e.g., *Goodbye to Somalia*, BALTIMORE SUN, Mar. 2, 1995, at 14A.

100. See Mark R. Hutchinson, Note, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624, 634 (1993).

101. James Adams, *A Farewell to Arms?*, SUNDAY TIMES, Jan. 15, 1995 at 1.

102. Eric Schmitt, *Feb. 26-Mar. 4: Bittersweet Finale; Marines Leave the Shores of Somalia*, N.Y. TIMES, Mar. 5, 1995, § 4, at 2.

forces. Frustrated, the Security Council voted to gradually withdraw UNOSOM from Somalia. The last Pakistani U.N. peacekeepers left Somalia on March 4, 1995 under escort by 1,800 U.S. Marines.

In January 1995, as the United Nations operation in Somalia was drawing to a close, Secretary-General Boutros-Ghali issued a supplement to his 1992 report *An Agenda for Peace*.¹⁰³ This supplement noted that United Nations operations were increasingly intra-state rather than inter-state. For example, of the five peacekeeping operations underway in 1988 only one, representing twenty percent of the total, involved an intra-state conflict. Of the twenty-one operations established since early 1988, thirteen (sixty-two percent) involved intra-state conflict. The trend is even more pronounced in the United Nations' most recent operations. Of the eleven operations established since January 1992, nine (eighty-two percent) involve intra-state conflicts.¹⁰⁴

The Secretary-General also recognized the emergence of a new type of United Nations military operation based on UNOSOM's mission in Somalia:

A second qualitative change is the use of United Nations forces to protect humanitarian operations. . . . This has led, in Bosnia and Herzegovina and in Somalia, to a new kind of United Nations operation. Even though the use of force is authorized under Chapter VII of the Charter, the United Nations remains neutral and impartial between the warring parties, without a mandate to stop the aggressor (if one can be identified) or impose a cessation of hostilities. Nor is this peace-keeping as practised hitherto, because the hostilities continue and there is often no agreement between the warring parties on which a peace-keeping mandate can be based.¹⁰⁵

Unlike the case of Iraq, there is not even the possibility of appealing to the catch-all language of Article 39 to justify this humanitarian mission. The civil war in Somalia did not pose any serious danger to international peace. The main concern prompting enforcement action by the Security Council was the extreme situation created by the combination of famine, death, and disease caused by the civil war; the breach of *humanitarian law* by the warring factions; and the general situation of anarchy. Resolution 794 referred to "the magnitude of the human tragedy caused by the conflict," and "the deterioration of the humanitarian situation."¹⁰⁶ Most

103. *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, U.N. GAOR, 50th Sess., ¶ 11, U.N. Doc. A/50/60 (1995).

104. *Id.* at 3.

105. *Id.* at 5-6.

106. S.C. Res. 794, *supra* note 86, at 1.

significantly, the Security Council mentioned the reports of "widespread violations of international humanitarian law" in Somalia, including the violence against personnel participating in humanitarian relief.¹⁰⁷ The Security Council summed up the situation as "intolerable," adding that it had become necessary to review "the basic premises and principles of the U.N. effort" in Somalia. This was, of course, a reference to the distinction between peacekeeping action, which is partly based on consent by the territorial state, and enforcement action based on Chapter VII of the Charter.¹⁰⁸

After demanding a cease-fire in the civil conflict, the Security Council, "[a]cting under Chapter VII," authorized the Secretary-General and member states to use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."¹⁰⁹ Of course, "all necessary means" includes the use of force; while this had been established in the Gulf War precedent, it was specifically recognized in Resolution 794 when the Security Council endorsed the recommendation of the Secretary-General.¹¹⁰

The import of Resolution 794 is thus not difficult to glean: the Security Council authorized member states to stop, by force if necessary, the egregious violations of humanitarian law in Somalia. The Security Council expressly reaffirmed that the Somali people "bear ultimate responsibility for the reconstruction of their own country."¹¹¹ But the message of Resolution 794 was that political groups may not violate the constraints imposed by humanitarian law when deciding their own political fate. This is a pristine case of collective forcible intervention to put an end to a civil war during which warring factions have committed serious violations of human rights. The resolution's reference to the "call by Somalia" underscored that the goal was to rescue the Somali people from the horrors of the war. The Security Council did not merely authorize intervention to make sure that humanitarian law was respected; it *demand-ed* a cease-fire. Under the powers granted to the Security Council by Articles 25, 39, 41, and 42 of the Charter, this demand is mandatory.

Some may challenge the validity of this precedent for humanitarian intervention on the grounds that this was not an action to overthrow a tyrannical government, which is the traditional, although contested, paradigm of humanitarian intervention. They may emphasize that there was not even a government in Somalia. Unlike the cases that supporters

107. *Id.*

108. For a recent description of the distinction, see Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89, 89-91 (Winter 1992-93).

109. S.C. Res. 794, *supra* note 86, at ¶ 10.

110. *Id.* at ¶ 7.

111. *Id.* at 2.

of humanitarian intervention cite, the intervention in Somalia did not aim at stopping *government-directed* human rights violations. It is argued that Resolution 794 is not a valid precedent for the legitimacy of collective humanitarian intervention.

This argument is not convincing. For one thing, the fact that there is no government does not mean that there is no *state*. No one denies Somalia's status as a state and the Somalis' right to their own state; indeed this point was expressly underscored by the Security Council. The intervention, however, punctured the sovereignty of Somalia as a state, and anti-interventionists need to explain that phenomenon, unless they concede that the purpose of the non-intervention rule is to protect *governments* per se. In addition, this is a case of civil war, a domestic situation in which foreign intervention is traditionally banned.¹¹² Finally, it is important to emphasize that "humanitarian law" is no more than the body of *human rights* principles that must be respected by all parties in an armed conflict.¹¹³ Therefore, an intervention to put an end to violations of humanitarian law is an intervention to uphold human rights — the human rights that parties in a war, civil or international, are bound to honor. Resolution 794 went further by demanding not merely respect for the laws of war, but an end to the civil conflict itself. It went that far because the "human tragedy" was caused by the war. In Resolution 794, human suffering took precedence over state sovereignty, which is precisely the policy that undergirds humanitarian intervention.

Anti-interventionists again will call attention to the language in the preamble of Resolution 794, where the Security Council determined "that the magnitude of the human tragedy caused by the conflict in Somalia" constituted "a threat to international peace and security."¹¹⁴ This is a case that fell squarely within the terms of Article 39 which defines the powers of the Security Council only in terms of breach of international peace or threat thereto.

This view wrongly focuses on what the Security Council says instead of what it does. The Security Council's decisions are governed by international law. The Security Council runs afoul of the Charter if it determines that a situation is a threat to the peace when in reality it is not. The Council does not have discretion (in the strong sense of creating fresh law) to authorize enforcement measures to address *any* situation so long as it invokes the language of Article 39. A defense of Resolution 794 requires postulating a *preexisting* legal principle that justifies that resolu-

112. See O'Connell, *supra* note 85, at 908 n.37.

113. See generally RICHARD B. LILICH & FRANK C. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 667-83 (2d. ed. 1991).

114. S.C. Res. 794, *supra* note 86, at 1.

tion, a principle that the international community could invoke as grounds for the action in Somalia. That principle can only be the power of the Security Council to authorize forcible measures in extreme situations of human rights violations. Anti-interventionists would be on surer footing if they flatly challenged the legality of Resolution 794 because it falls outside of Article 39 standards, instead of claiming that the resolution is really about restoring international peace and not about protecting human rights. In fact, their anti-interventionism becomes empty if they take the latter position: the Security Council can do as it pleases, provided it pays lip service to the language of Article 39. There is only a jurisprudential difference between this position and the position this article defends — that the Security Council may authorize humanitarian intervention in appropriate cases. The difference is that I argue that international law properly interpreted *did* authorize collective humanitarian intervention at the time the Security Council was called upon to act on the Somalian situation. That right was not created afresh by Resolution 794.

The language in Resolution 794 to the effect that the situation in Somalia had a “unique character” of a “deteriorating, complex, and extraordinary nature”¹¹⁵ does not bar this conclusion. It is obviously true that the situation was unique and extraordinary, in the sense that only this kind of extreme situation warrants the collective use of force. This is perfectly consistent with the doctrine of humanitarian intervention. The doctrine does not recommend the use of force to remedy every human rights problem, any more than the doctrine of self-defense recommends using force to repel every unlawful act. Only serious human rights violations that cannot be remedied by any other means warrant proportionate collective forcible intervention for the purpose of restoring human rights, provided that the victims themselves welcome the intervention, as they did in Somalia.¹¹⁶ For example, the Security Council would have exceeded its powers if it had installed one of the faction leaders in power, because that would have been inconsistent with the humanitarian character of the intervention.

That the situation is “unique” thus cannot mean that this was the only case, the only exception where intervention in the domestic affairs of a state will ever be authorized; that would mean that the Security Council did not act on principle. Resolution 794’s reference to the uniqueness of the situation instead means that this was an extraordinary case covered by a principle that authorizes intervention only in this class of extraordinary cases; Resolution 794 should not therefore be construed as a precedent for

115. *Id.* The same language was used by the Security Council in its recent imposition of non-forcible sanctions against Haiti. See *infra*, part III.D.

116. S.C. Res. 794, *supra* note 86, at 2.

finding a broad grant of power to the Security Council to authorize intervention in less egregious cases. This interpretation of the "uniqueness" language was confirmed by the case of Haiti.

D. *The Case of Haiti, 1994*

The case of Haiti is the most important precedent supporting the legitimacy both of an international principle of democratic rule and of collective humanitarian intervention. In 1987, the Organization of American States (OAS) urged Haiti to resume the democratic process through free elections.¹¹⁷ No "sovereignty" limitation or exception was attached to this resolution. In 1990, Reverend Jean-Bertrand Aristide was elected President of Haiti with sixty-seven percent of the popular vote.¹¹⁸ On September 30, 1991, a military coup removed Aristide from office. While the Security Council assembled later that day at the request of Haiti's Ambassador to the United Nations, it did not formally convene to consider the coup, allegedly because a majority of its members saw the coup as an internal domestic matter which did not constitute a threat to the peace placing it within the competence of the Security Council.¹¹⁹

In contrast to the Security Council's initial inaction, the OAS responded quickly to the coup. At an *ad hoc* meeting on October 2, 1991, the foreign ministers of OAS members formally condemned the coup and recommended that its members impose economic and diplomatic sanctions on Haiti.¹²⁰ The Security Council convened formally to hear President Aristide address the Council on October 3, 1991. All members denounced the coup and expressed strong support for the OAS action but the Council failed to adopt a formal resolution addressing the coup, reportedly because China and certain non-aligned states were concerned about increasing Security Council involvement in affairs traditionally considered domestic and thus beyond the realm of the United Nations' concern.¹²¹

117. O.A.S. Permanent Council Resolution, *Solidarity With the People of Haiti*, O.A.S. Doc. OEA/Ser.G/CP/RES.489, Doc. 720/87 (1987).

118. Douglas Farah, *Carter Makes Return Visit to Wary Haiti: Aristide's Government Fears Meddling in Vote*, WASH. POST, Feb. 24, 1995, at A16.

119. See Anthony C. Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491, 500-01 (1993). See also Thomas L. Friedman, *U.S. Suspends Assistance to Haiti and Refuses to Recognize Junta*, N.Y. TIMES, Oct. 2, 1991, at A1.

120. *Support to the Democratic Government of Haiti*, O.A.S. Res. 1/91, OEA/Ser.F/V.1, MRE/RES.1/91 Corr. 1 (Oct. 3, 1991), reprinted in *Letter Dated 3 October 1991 from the Permanent Representatives of Ecuador and the United States of America to the United Nations*, U.N. Doc. S/23109, Annex at 2-3 (1991).

121. See U.N. SCOR, 46th Sess., 3011th mtg., U.N. Doc. S/PV.3011 (1991); Arend, *supra* note 119 at 501-02; Paul Lewis, *U.N. Stops Short of Haiti Resolution*, N.Y. TIMES, Oct. 4, 1991, at A8.

When the General Assembly took up the issue of the Haiti coup it went further than ever before: it strongly condemned the "illegal replacement of the constitutional President of Haiti" and affirmed as "unacceptable any entity resulting from that illegal situation."¹²² Here again, there is neither mention of Haiti's "right" to "choose its political system," nor any reference to Haiti's sovereignty or self-determination.

The refusal by Lieutenant General Raoul Cédras and Brigadier General Phillipe Biamby, Haiti's *de facto* military dictators, to reinstate the democratically-elected Aristide government, and the continued violent persecution of Aristide supporters, led the Security Council to finally adopt coercive measures against Haiti in June 1993. Acting under Chapter VII of the Charter, the Security Council imposed a mandatory economic embargo on Haiti.¹²³ The Security Council's binding resolution expressly affirmed that the solution to the crisis in Haiti "should take into account the above-mentioned resolutions of the Organization of American States and of the General Assembly of the United Nations" — i.e., the restoration of democracy in Haiti.¹²⁴

The strict United Nations sanctions induced the Haitian military junta to accept a U.N.-brokered agreement in July 1993, known as the Governors Island Agreement, which would have returned Haiti to democratic rule under President Aristide.¹²⁵ Under the terms of Resolution 841 and the Governors Island Agreement, the United Nations lifted the economic sanctions on Haiti on August 27, 1993, because the junta had begun implementing the arrangements for the restoration of democratic rule.¹²⁶ The Governors Island Agreement collapsed, however, when violence against Aristide supporters resurfaced in September and October of 1993, reaching a crisis point when pro-junta mobs blocked the debarkation of troops assigned to assist in the monitoring and modernization of Haiti's police and military under U.N. Resolution 867.¹²⁷ On October 13, 1993 the Security Council unanimously passed Resolution 873 which reimposed

122. G.A. Res. 7, *supra* note 25, at 2.

123. S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., at 3, U.N. Doc. S/RES/841 (1993). This resolution imposed a compulsory embargo on the delivery of oil, petroleum products, arms, and police equipment, and froze assets of the Haitian government and its *de facto* leaders. Resolution 841 expressly relies on the previous OAS and General Assembly Resolutions.

124. See also S.C. Res. 841, *supra* note 123, at 2; *Clinton Acts to Block Trade With Haiti: U.S. Backs U.N. With Unilateral Sanctions*, 10 Int'l Trade Rep. (BNA) No. 41, at 1756 (June 16, 1993).

125. Lori F. Damrosch, *Recent Security Council Actions Concerning Internal Conflicts: Economic Sanctions*, AM. SOC'Y INT'L L. NEWSL., Jan. 1994, at 1, 2.

126. S.C. Res. 861, U.N. SCOR, 48th Sess., 3271st mtg., U.N. Doc. S/RES/861 (1993).

127. S.C. Res. 867, U.N. SCOR, 48th Sess., 3282d mtg., U.N. Doc. S/RES/867 (1993).

the economic sanctions.¹²⁸ The Security Council authorized member states to use military force to enforce the sanctions in Resolution 875 passed on October 16, 1993.¹²⁹

On July 31, 1994, the Security Council adopted Resolution 940. This resolution authorized member states "to form a multinational force [and] . . . to use all necessary means to facilitate the departure from Haiti of the military leadership."¹³⁰ Acting under this United Nations mandate, the United States and other member states turned up the pressure on Haiti's military leadership. On September 15, President Clinton delivered an ultimatum to Haiti's ruling junta via a television address to the American public. He indicated that diplomatic measures had been exhausted and that a military invasion was a near certainty.¹³¹ On September 18, former U.S. President Jimmy Carter, accompanied by Senator Sam Nunn, and former Chairman of the Joint Chiefs of Staff General Colin Powell, persuaded the junta's leadership to agree to surrender power to President Aristide and to leave the country by October 15. This agreement was reached only hours before an invasion by U.S.-led multinational forces were to land in Haiti.¹³² The next day 3,000 U.S. troops from the Army's Tenth Mountain Division landed in Port-au-Prince Haiti,¹³³ and within a matter of days the total had swelled to over 20,000 troops.¹³⁴

International reaction was almost universally positive to the September 18th agreement and the subsequent United States occupation. The new Secretary-General of the OAS voiced "deep satisfaction over the agreement, which assumes that political measures and diplomacy will prevail."¹³⁵ Venezuela was the only Latin American nation to condemn the United States action in Haiti.¹³⁶ After the Haitian military and police administered random public beatings to pro-Aristide demonstrators during the first few days of the occupation in full view of U.S. troops, President

128. S.C. Res. 873, U.N. SCOR, 48th Sess., 3291st mtg., U.N. Doc. S/RES/873 (1993).

129. S.C. Res. 875, U.N. SCOR, 48th Sess., 3293d mtg., U.N. Doc. S/RES/875 (1993).

130. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., at ¶ 4, U.N. Doc. S/RES/940 (1994).

131. *Haiti's Military Junta Agrees to Step Down; U.S. Recalls Invasion Force*, FACTS ON FILE 673, 673 (1994).

132. Farah, *supra* note 118, at A16.

133. See Larry Rohter, *3,000 U.S. Troops Land Without Opposition and Take Over Haiti's Ports and Airfields*, WASH. POST, Sept. 20, 1994, at A1.

134. Farah, *supra* note 118, at A16.

135. *Haiti's Military Junta Agrees to Step Down; U.S. Recalls Invasion Force; Aristide's Return Set*, *supra* note 131, at 674.

136. *Id.* (quoting Venezuela's Foreign Minister, Miguel Angel Burelli Rivas, "This is the 16th United States military intervention in Latin America, and it is lamentable").

Clinton ordered U.S. forces to abandon the original policy of non-interference and prevent such violence by anti-Aristide forces.¹³⁷

U.S. forces in Haiti met no armed resistance during the initial troop landing and, until February 25, 1995, suffered no casualties while restoring democracy and stability to Haiti.¹³⁸ The United States officially turned the mission over to the United Nations on March 31, 1995. Of the 6,000 U.N. troops, about 2,400 were U.S. personnel.¹³⁹

An analysis of Resolution 940 and subsequent events confirms the conclusions reached in the cases of Iraq and Somalia. The resolution determined that "the illegal *de facto* regime" in Haiti had failed to comply with the Governors Island Agreement and with previous resolutions of the Security Council. The Security Council expressed its concern with the "significant further deterioration of the humanitarian situation," and particularly the regime's "systematic violation of civil liberties." Thus the Security Council invoked human rights abuses as well as the illegitimacy of the regime as the operative reasons for authorizing military action.

Unlike the Somalia case, the Security Council did *not* determine that the situation in Haiti constituted a threat to international peace and security while asserting that it was acting under Chapter VII. Thus, this case-study strengthens the interpretation of the Charter suggested in this article: that states have accepted serious violations of human rights as grounds for action by the Security Council under Chapter VII. Resolution 940, like Resolution 794, refers to the "unique character of the present situation in Haiti and its deteriorating, complex, and extraordinary nature, requiring an exceptional response." That the Security Council considered Haiti *another* "unique situation" confirms the interpretation of this language suggested in the discussion of the events in the Somalia case, namely that Somalia was not a strictly "unique" case, but certainly an "extraordinary" one, and that subsequent equally "extraordinary" cases can occur — as shown by the fact that there have been now two such "unique" cases.

What are the possible arguments against treating the Haitian case as a genuine precedent for collective humanitarian intervention? Anti-interventionists may argue, again, that in fact the Security Council found a threat to the peace and thus authorized the military action under the classic terms of Article 39. To the argument that Resolution 940 does not even try to characterize the situation in Haiti as a threat to the peace, they may reply that Resolution 940 refers to previous Security Council resolutions on Haiti and that in those resolutions the Council did determine

137. *Id.*

138. Farah, *supra* note 118, at A16.

139. *Id.*

that there was a threat to international peace and security in the region.¹⁴⁰ This is stubborn adherence to the anti-interventionist thesis even when it flies squarely in the face of the facts. No one can seriously argue that the Haitian situation posed a threat to international peace and security in the region. A more accurate reading of Resolution 940 is that the reference to threat to the peace in the region in Resolution 841 was unpersuasive because it reflected neither the facts nor the normative context of the Haitian situation. For that reason, the Security Council, in Resolution 940, sensibly abandoned the reference to the language of Article 39.

Another strategy could be to maintain that the United States acted out of purely selfish motives, not humanitarian ones, either to stop the flux of refugees or to get rid of a problem in the United States' "backyard." First, this view confuses psychological motivation with legal justification.¹⁴¹ Second, this view is inconsistent with the wording of Resolution 940 — the legal grounds for the U.S.-led intervention. Anti-interventionists would have to say that the Security Council simply lied when it mentioned human rights abuses and the restoration of democracy in the resolution. More importantly, President Clinton gave the humanitarian justification of the intervention in his address of September 15, 1994.¹⁴² President Clinton referred repeatedly to the atrocities committed by the Haitian dictators, and not just to the interruption of the democratic process in Haiti. The President did stress that such atrocities affected United States interests, but that begs the question of what is the legitimate U.S. national interest. If one asks why the atrocities affected U.S. interests, a plausible answer is that the national interest as defined in a broader sense, and not just in terms of pure national egoism,¹⁴³ was affected precisely because the atrocities were morally intolerable. One could reply that the United States' national interest was affected by the flow of Haitian refugees into U.S. territory.¹⁴⁴ This is certainly true but only means that the United States had a self-regarding motive *in addition* to its humanitarian motives. The United States receives a huge flux of illegal immigrants from Mexico every year, and no one would suggest that such a "refugee problem" justifies armed action or even non-forcible action against Mexico. The Haitian "refugee problem" is best defined as "the refugee exodus caused

140. See, e.g., S.C. Res. 841, *supra* note 123, at 2.

141. See TESÓN, *supra* note 3, at 111–23.

142. *Text of President Clinton's Address on Haiti*, WASH. POST, Sept. 16, 1994, at A31.

143. People who talk about the national interest tend to have, in my view, a noticeably narrow definition of what national interest should be and typically is in a democracy. Why would citizens of a democracy define national interest as only strategic, economic, or political advantages over other nations? It seems to me that typically, a democratic government also advances the national interest if it is responsive to the moral indignation that citizens feel when confronted with serious violations of human rights outside the state's borders.

144. *Text of President Clinton's Address on Haiti*, *supra*, note 142.

by oppression" and not as "the refugee exodus" *tout court*. Finally, there is no reason why the existence of mixed motives should blight an otherwise justified intervention, especially since the Haitian case is one where the humanitarian motive is overwhelmingly predominant.

Another possible argument is that the action by the multinational force is not a case of humanitarian *forcible* intervention. The U.S.-led forces occupied the country either with the consent of the junta, that is, of the effective government as required by traditional international law, or with the consent of the legitimate government, President Aristide, as required by modern international law. Thus this is a mere case of peacekeeping and not an enforcement action. This position cannot be seriously maintained. The position that the junta's consent validates the intervention is deficient for two reasons. First, it begs the question of the junta as the legitimate government of Haiti, and thus as the valid consenting agent.¹⁴⁵ Second, on these facts, no one can say that the junta validly consented to the occupation. Their "consent" was exacted by U.S. envoys under the threat of military invasion.¹⁴⁶ A cursory reading of the Vienna Convention on the Law of Treaties will suffice to dismiss such an agreement as internationally binding.¹⁴⁷ The correct legal position is that the overthrow of the junta was achieved by the threat of force, which would be prohibited by the U.N. Charter¹⁴⁸ but for the existence of a justification such as humanitarian intervention. Because the language of Resolution 940 ("all necessary means") includes the use of force, *a fortiori* it includes the threat of force. The method followed by the United States is in compliance with the requirements of necessity and proportionality, since it was the least intrusive action necessary to achieve the result mandated by Resolution 940.¹⁴⁹ From a moral and political standpoint, the United States government must be commended for having achieved the desired result — the restoration of human rights in Haiti — without resorting to open combat.

The argument that President Aristide consented to the intervention is more persuasive, yet it is questionable on several grounds. First, it is not clear that consent was actually given.¹⁵⁰ Second, the position contradicts

145. For a thorough discussion of intervention by consent, see David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607 (1995).

146. See *On the Brink of War, A Tense Battle of Wills*, N.Y. TIMES, Sept. 20, 1994, at A1, A13.

147. See Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 52, 1155 U.N.T.S. 34.

148. See U.N. CHARTER art. 2, ¶ 4.

149. See generally Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

150. For an account of the changes of opinion by Aristide, see Deborah Zabarenko, *Aristide Thanks U.S., Gets Assurances on Haiti*, REUTERS, Sept. 21, 1994, available in LEXIS, Nexis Library, Non-US file.

one of the most cherished anti-interventionist dogmas — the principle that the internationally legitimate government is the one that has effective control.¹⁵¹ Third, a fair reading of Resolution 940 and the statements of President Clinton and others shows that the legitimacy of forcible action did not depend on Aristide's legitimacy. Because the situation in Haiti was much more serious than mere illegitimacy of the origin of the government, a denial of consent by Aristide would not have sufficed to foreclose the legality of the collective action, and his consent was not required by Resolution 940. Finally, if the consent by Aristide is considered valid, that would only mean that the intervention was overdetermined, that is, justified under more than one principle.

The only internally consistent argument denying the validity of this precedent that is also consistent with the facts, is one which characterizes the whole incident as an ongoing violation of international law where the Security Council, under political pressure from the United States, overstepped its powers under the Charter. This position certainly bites the bullet and would presumably also deny the legality of the current practice of the Security Council as exemplified by the other cases discussed in this article. This argument does have the merit of avoiding verbal sophistry, but instead faces a formidable challenge: it is not possible to maintain this view and simultaneously adhere to a positivist conception of international law where state and United Nations practice are the yardstick of legitimacy. The anti-interventionist making this argument must supply policy and moral reasons why this practice is illegitimate despite the fact that it seems to satisfy the requirements of "right process."¹⁵² For example, anti-interventionists might argue, along the lines suggested by Michael Walzer,¹⁵³ that the Security Council ignored Haiti's communal integrity — the right of Haitians to resolve their political differences among themselves — and that Resolution 940 must be seen as a violation of Article 39 as interpreted in the light of Walzer's principle,¹⁵⁴ not as an extension of the permissible grounds for collective action. Such a position is morally false and ought to be rejected.¹⁵⁵ States exist primarily to protect human rights. A government such as the Haitian junta which seizes

151. Of course, this is not fatal to the anti-interventionists, because they may reject the principle of effective control and endorse instead the right to democratic governance, while opposing the legitimacy of forcible humanitarian intervention.

152. See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

153. See Michael Walzer, *The Moral Standing of States: A Reply to Four Critics*, in INTERNATIONAL ETHICS 217 (Charles R. Beitz et al. eds., 1985).

154. Walzer's principle is "always act so as to recognize and uphold communal autonomy." Michael Walzer, *The Rights of Political Communities*, in INTERNATIONAL ETHICS, *supra* note 153, at 165, 181.

155. See TESÓN, *supra* note 3, at 53–94.

power by force and turns against its own citizens betrays its very *raison d'être* and cannot be treated as legitimate. A view that describes governmental murder, rape, and torture as "a process of self-determination" is simply grotesque and may be dismissed without regrets.

E. *The Case of Rwanda, 1994*

In another striking example of the changing winds in the United Nations, the Security Council approved France's proposal to intervene in Rwanda, by a vote of ten to zero with five abstentions on June 22, 1994.¹⁵⁶ Resolution 929 authorized France to use "all necessary means" to protect civilians in a violent civil war that had erupted in Rwanda. The Council also required the French to conduct a "strictly humanitarian . . . impartial and neutral" operation, that is, one divorced from the merits of the dispute between government and Rwandan Patriotic Front (RPF) forces.

The crisis in Rwanda was triggered on April 6, 1994, when the President of Rwanda was killed when his plane was shot down while approaching the Rwandan capital of Kigali. Although the source of the attack has not been pinpointed, extremist Hutus are widely suspected of having carried out the attack.¹⁵⁷ The Hutu-dominated Rwandan military, however, blamed the incident on the minority Tutsis, who constitute fifteen percent of Rwanda's population.¹⁵⁸ Within hours, young French-trained Hutu militiamen, known as *interhamwe*, began slaughtering innocent Tutsis and moderate Hutus by the thousands. The RPF reacted by quickly restarting its dormant civil war against the Rwandan government.¹⁵⁹

There were 2,700 U.N. observers already stationed in Rwanda as part of the United Nations Assistance Mission for Rwanda (UNAMIR) to monitor a peace agreement between the Rwandan government and the RPF. They were powerless to stop the killing. Belgium recalled its 440 troops, and the remainder of the lightly-armed observer force stayed in their barracks after ten U.N. troops from Belgium assigned to guard Rwandan Prime Minister Agathe Uwilingiyimana were brutally hacked

156. See *Draft Resolution Concerning the Deployment of A Temporary Multinational Humanitarian Operation in Rwanda*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/737 (1994); S.C. Res. 929, U.N. SCOR, 49th Sess., 3392d mtg., U.N. Doc. S/RES/929 (1994).

157. Raymond Bonner, *Shattered Nation: A Special Report: Rwanda Now Faces Painful Ordeal of Rebirth*, N.Y. TIMES, Dec. 29, 1994, at A1, A14.

158. *Id.*

159. See Scott Kraft, *France's Big Gamble Pays Off in Rwanda*, L.A. TIMES, July 16, 1994, at A1. The civil war between the French-backed, Hutu-dominated government of Rwanda and the mostly-Tutsi RPF erupted in October 1990. The RPF attacked government forces from Rwandan refugee bases in Uganda. In August 1993, the government and the RPF signed a peace accord in Arusha, Tanzania, but the accord was never fully implemented. In November 1993, over 2,000 United Nations troops arrived to monitor the accord. Bonner, *supra* note 157, at A1.

to death during the slaying of the Prime Minister.¹⁶⁰ By April 18, the International Committee of the Red Cross had reported that "tens of thousands" of Rwandans had already been killed. The Security Council voted on April 21 to reduce the number of U.N. personnel in Rwanda to 270 to prevent additional United Nations casualties in the faint hope that the carnage would somehow cease.¹⁶¹ Soon, hundreds of thousands of refugees began fleeing to neighboring Tanzania and Zaire.

In early May, when the Security Council realized that the killing continued unabated, it began to discuss sending a United Nations force of 5,500 African troops to Rwanda. The Security Council voted on May 17 to increase the authorized force level of UNAMIR to 5,500 troops but had obtained no commitments from member nations to provide such forces.¹⁶² On May 31, Secretary-General Boutros-Ghali reported to the Security Council that an estimated 250,000 to 500,000 Rwandan men, women, and children had already been killed.¹⁶³ The Secretary-General pointed out that in a nation of approximately seven million persons, this was proportional to the killing of two to four million in France and nine to eighteen million in the United States.¹⁶⁴ The report concluded with a mix of disgust and anger over the inability of the United Nations to respond to the crisis:

The magnitude of the human calamity that has engulfed Rwanda might be unimaginable but for its having transpired. On the basis of the evidence that has emerged, there can be little doubt that it constitutes genocide, since there have been large-scale killings of communities and families belonging to a particular ethnic group. . . .

. . . .

In the meantime, it is unacceptable that, almost two months since this violence exploded, killings still continue.¹⁶⁵

160. Thomas W. Lippman, *U.S. Troop Withdrawal Ends Frustrating Mission to Save Rwandan Lives*, WASH. POST, Oct. 3, 1994, at A11.

161. See S.C. Res. 912, U.N. SCOR, 49th Sess., 3368th mtg., U.N. Doc S/RES/912 (1994); Bonner, *supra* note 157, at A1; Pamela Constable, *World Response to Rwanda Crisis Questioned*, BOSTON GLOBE, July 28, 1994, at 18.

162. See S.C. Res. 918, U.N. SCOR, 49th Sess., 3377th mtg., U.N. Doc. S/RES/918 (1994).

163. *Report of the Secretary-General on the Situation in Rwanda*, U.N. SCOR, 49th Sess., at 2, U.N. Doc. S/1994/640 (1994).

164. *Id.* at 2-3.

165. *Id.* at 11.

A United Nations study subsequently confirmed that Hutu militants were guilty of genocide against the Tutsis, but no evidence was found that the Tutsi-led RPF committed the systematic reprisals alleged by the Hutus.¹⁶⁶

Death did not cease at the Rwandan borders as refugee camps in Goma, Zaire were swept with outbreaks of cholera taking up to twenty thousand additional lives.¹⁶⁷ Over the next several weeks, the Security Council was unable to obtain commitments from member nations for the needed troops, equipment, logistics, and transportation. The United States, still reeling from unexpectedly large military casualties in Somalia, flatly rejected requests for participation in the United Nations force. It generally opposed the idea of deploying any large United Nations peacekeeping force to Rwanda while the fighting continued and without having secured firm commitments from member nations to supply troops and equipment. The cautious U.S. approach was somewhat justified since over two months after the genocide in Rwanda had begun, and a month after the Security Council had authorized an expanded UNAMIR mission in Rwanda, only Ethiopia had committed a fully-equipped unit.¹⁶⁸ The United States was also concerned about the potential costs of a large, extended United Nations mission in Rwanda because the United States is required to pay over thirty percent of the cost of these missions.¹⁶⁹

On June 19, Secretary-General Boutros-Ghali wrote to the Security Council indicating that it would take several additional weeks before the expanded UNAMIR troops and equipment would be available for deployment within Rwanda.¹⁷⁰ With evidence of the scale of the atrocities in

166. Richard D. Lyons, *U.N. Study Accuses Hutu in Rwanda Killings*, N.Y. TIMES, Dec. 3, 1994, at A17. The United Nations Human Rights Commission investigation concluded that "there exists overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way." *Id.* (quoting United Nations investigator Atsu-Koffi Amega).

167. *Report of the Secretary-General on the Situation in Rwanda*, U.N. SCOR, 49th Sess., at 3, U.N. Doc. S/1994/924 (1994).

168. Julia Preston, *U.N. Supports France on Force for Rwanda*, WASH. POST, June 22, 1994, at A24.

169. U.S. reluctance to support a major United Nations intervention in Rwanda was based in large measure on the policy direction contained in Presidential Decision Directive 25 (PDD-25) signed by President Clinton on May 2, 1994, during the height of the genocide in Rwanda. PDD-25 spelled out strict guidelines to be considered before the United States agrees to participate in any multilateral military operation, including the impact on U.S. interests, the availability of troops and funds, the necessity of United States participation, congressional approval, a clear date for United States withdrawal, and acceptable command and control arrangements. PDD-25 also directed that the United States not approve any new United Nations operation, with or without U.S. troop participation, unless the crisis represents a threat to international peace and security, specifically including starvation among civilians, gross abuses of human rights, or a violent overthrow of a democratically elected government. Any proposed objective must lay out clear objectives, the availability of adequate funding and troops, the consent of the parties to the conflict, and a realistic exit strategy. See Thomas G. Weiss, *The United Nations and Civil Wars*, 17 WASH. Q., Autumn 1994, at 139, 153.

170. See *Letter Dated 19 June 1994 From the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/1994/728 (1994).

Rwanda mounting — a United Nations report estimated that three million Rwandans were displaced internally and more than two million had fled to neighboring countries¹⁷¹ — the French government sent the Security Council a proposal for unilateral intervention to halt the bloodshed and establish safe havens for the hundreds of thousands of fleeing refugees.¹⁷² By June 22, three days after the Security Council approved the French intervention, 2,500 French troops were in Rwanda and neighboring Zaire establishing safe havens for refugees near the border. French troops helped distribute relief supplies and patrolled the countryside in tanks and armored vehicles.

While critics of the intervention had expected French forces to assist Rwandan government troops in the fight against the RPF, as France had done in 1990, French troops stood aside as the RPF seized control of Kigali on July 4. French forces also did nothing to prevent the fall of Butare, Rwanda's second largest city, to RPF forces on July 5, or the fall of Ruhengeri, the Rwandan government stronghold, on July 14. On July 17, retreating government forces were routed by the RPF at Gisenyi, and on July 18, the RPF declared a unilateral cease-fire, effectively ending the civil war. On July 19, the RPF formed a government of national unity in Kigali.¹⁷³ French forces withdrew from Rwanda after two months, urging the United Nations to send replacements as soon as possible.¹⁷⁴ By August 1994, several thousand blue-helmeted U.N. troops from Ethiopia, Ghana, and Zimbabwe had replaced the French troops.

There is little doubt that the U.N.-authorized French mission is best described as a case of legitimate humanitarian intervention. Many of the arguments presented in the previous sections apply here as well. The United Nations resolution authorized the use of force, and while there were references to a "threat to international peace and security," it is quite obvious that the purpose of the mission was to stop the atrocities taking place in the Rwandan civil war. It is also worth noting the relative disinterestedness shown by the French government, as evidenced by its prompt withdrawal. Unfortunately, the situation in Rwanda has not been completely alleviated. The fact that the operation was not entirely successful does not impair its legitimacy, however — final success is not a requirement of right action.

171. *Report of the Secretary-General on the Situation in Rwanda*, *supra* note 167, at § 8.

172. See *Letter Dated 20 June 1994 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General*, U.N. SCOR, 48th Sess., U.N. Doc. S/1994/734 (1994).

173. *Report of the Secretary-General on the Situation in Rwanda*, *supra* note 167, at 1.

174. Paul Lewis, *France Calls Rwanda Mission a Success: Asks for U.N. Force*, N.Y. TIMES, July 11, 1994, at A8.

F. *The Intervention of NATO in Bosnia, 1995*

The complicated conflict in the former Yugoslavia created one of the toughest dilemmas for the Western alliance at the end of the Cold War. Much has been written about this tragic war, which fortunately seems, at the time of this writing, to have come to a close.¹⁷⁵ In this article, I will focus on only one aspect of it: the legitimacy of the NATO air operations against Bosnian Serb positions. This is another instance of collective humanitarian intervention, notwithstanding the fact that the operations were also intended to force the Bosnian Serbs to negotiate for peace.

Yugoslavia was formed around a Serbian core during a series of wars in the nineteenth and twentieth centuries as the Ottoman Empire gradually lost control of the Balkan territories.¹⁷⁶ After the fall of the Communist government, the republics that made up Yugoslavia started down the path toward secession. Croatia and Slovenia proclaimed their independence on June 25, 1991.¹⁷⁷ In Bosnia-Herzegovina, a referendum was held on February 29 and March 1, 1992, in which more than sixty-two percent of the voters favored independence.¹⁷⁸ The government declared independence on March 3, 1992. Almost immediately, rebel Bosnian Serb forces began violent efforts to overthrow the government, and the infamous practice of "ethnic cleansing" began.¹⁷⁹ The atrocities that were reported were of comparable gravity and magnitude to those committed by the Nazis in World War II.¹⁸⁰

175. For a general history of the region, see VLADIMIR DEDIFER ET AL., *HISTORY OF YUGOSLAVIA* (Marie Longyear ed. & Dordija Kreder trans., 1974). The literature on the war in Bosnia is voluminous. See generally EDGAR O'BALLANCE, *CIVIL WAR IN BOSNIA 1992-1994* (1995); Anthony D'Amato, *Peace v. Accountability in Bosnia*, 88 AM. J. INT'L L. 500 (1994); Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT'L L. & TRADE 1 (1995); Gideon A. Moor, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 FORDHAM INT'L L.J. 870 (1995); Symposium, *War Crimes: Bosnia and Beyond*, 34 VA. J. INT'L LAW 255 (1994); A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995).

176. For an account of the conflict, see *Chronology of Conflict in Former Yugoslavia*, REUTER, Oct. 12, 1995, available in LEXIS, Nexis Library, Curnws File.

177. Chuck Sudetic, *2 Yugoslav States Vote Independence to Press Demands*, N.Y. TIMES, Jun. 26, 1991, at A1.

178. See Tim Judah, *Bosnian Leader Warns Serbs to Respect Vote Verdict*, THE TIMES (London), March 4, 1992, at 8.

179. See Russel Watson et al., *Ethnic Cleansing*, NEWSWEEK, Aug. 17, 1992, at 16. On "ethnic cleansing" generally, see NORMAN L. CIGAR, *GENOCIDE IN BOSNIA: THE POLICY OF "ETHNIC CLEANSING"* (1995); on the horrendous crimes against women, see *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* (Alexandra Stiglmayer ed. & Marion Faber trans., 1994).

180. They included: A massacre of 200 Muslim men and boys by Serb police in Central Bosnia, see Mary Battiata, *Slayings in Bosnia Confirmed: Detained in Convoy Killed, Police*

The first time that the Security Council contemplated authorizing coercive measures to deal with the conflict was in the summer of 1992. In Resolution 770, the Security Council, acting under Chapter VII, called upon states "to take nationally or through regional agencies or arrangements *all measures necessary* to facilitate in coordination with the United Nations the delivery . . . of humanitarian assistance . . . in . . . Bosnia-Herzegovina."¹⁸¹ While recognizing that the situation in Bosnia amounted to a "threat to international peace and security," the Security Council was likewise "deeply concerned" by the reports of abuses against civilians. An examination of the debates surrounding the adoption of this resolution brings out two points: first, there was no doubt that the resolution properly authorized the use of force; second, the commission of atrocities was foremost in the minds of the delegates and was thus a powerful motivation for their votes. It is abundantly clear from the debates that the Council members endorsed the doctrine of humanitarian intervention.¹⁸²

The following year, the Security Council was faced with the failure of several efforts directed at protecting the Bosnian Muslim population. On October 9, 1993, the Security Council imposed a "no-fly" zone over Bosnia in order to prevent Serbian assaults from obstructing the transfer of humanitarian aid supplies.¹⁸³ When this proved difficult to enforce, the Security Council authorized member states to take "all necessary measures in the airspace of the Republic of Bosnia and Herzegovina in the event of further violations to ensure compliance with the ban on flights."¹⁸⁴ The Security Council referred to Resolution 770, and there was wide agreement on the need to put an end, by force if necessary, to the victimization

Say, WASH. POST, Sept. 28, 1992, at A1; murder of 2,000 to 3,000 Muslims by Serb irregulars; summary executions, see Estelle Lander, *New Reports on Atrocities*, NEWSDAY, Nov. 7, 1992, at 4; and widespread rape as an instrument to fulfill the goal of ethnic cleansing, see Lance Morrow, *Unspeakable*, TIME, Feb., 22, 1993, at 48. A moderate estimation places the number of raped women at 20,000, see Elaine Sciolino, *In Bosnia, Peace at Any Price is Getting More Expensive*, N.Y. TIMES, Jan. 10, 1993, at D4.

181. S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/770 (1992). The resolution was adopted by 12 votes in favor and three abstentions (China, India, and Zimbabwe).

182. See, *inter alia*, the statements by representatives of Ecuador, *Provisional Verbatim Record of the Three Thousand One Hundred and Sixth Meeting*, U.N. SCOR, 47th Sess., plen. mtg., at 9, U.N. Doc. S/PV.3106 (1992) (Security Council authorizes states to use force to ensure delivery of humanitarian assistance); and India, *id.* at 11-15 (desperate plight of the population demands urgent response which cannot exclude use of force). Even delegates who were skeptical about authorizing individual states to act (as opposed to undertaking a collective United Nations effort), conceded that the situation warranted the use of force. See, e.g., the statement by the delegate of Zimbabwe, *id.* at 14-17.

183. S.C. Res. 781, U.N. SCOR, 47th Sess., 3122d mtg., U.N. Doc. S/RES/781 (1992). See generally Timothy McIlmail, *No-Zones: The Imposition and Enforcement of Air Exclusion Regimes Over Bosnia and Iraq*, 17 LOY. L.A. INT'L & COMP. L.J. 35 (1994).

184. S.C. Res. 816, U.S. SCOR, 47th Sess., 3191st mtg., at 4, U.N. Doc. S/RES/816 (1993). This resolution was adopted by 14 votes in favor and one abstention (China).

that (for the most part) Bosnian Serbs were inflicting on civilian populations.¹⁸⁵ Pursuant to both of these resolutions, NATO air forces conducted a series of bombings and other military actions against Bosnian Serb positions. Partly as a result of the NATO demonstrations, the warring parties initiated peace negotiations which concluded in the accord signed in Paris in December 1995.

The intervention by NATO can be explained in part as a humanitarian effort, that is, as an action undertaken by the military alliance authorized by the United Nations with the purpose of putting an end to the intolerable human rights violations taking place in the war. While the initial United Nations authorization to use air power seemed to be limited to securing the delivery of humanitarian assistance and the enforcement of the "no-fly" zone, the NATO intervention far exceeded those limited purposes. Indeed, the strongest action by NATO took place as a response to the Bosnian Serb shelling of a Sarajevo market that killed 37 people.¹⁸⁶ A few days before that, the United Nations Rapid Reaction Force on Mount Igman outside Sarajevo had turned its heavy 155mm guns on the Serbs.¹⁸⁷

This incident illustrates the difficulties of insisting upon the neutrality or impartiality of humanitarian actions. This concept, as used by the relevant actors and observers, is highly ambiguous in contexts such as Bosnia. The prospective intervenor faces two types of problems. One is what we could call the *territorial* issue, that is, the merits of the dispute. What is the relative merit of the claims put forth by the different groups? Who has the right to what part of the territory? Is secession justified? These are difficult questions and it is certainly the case that anyone contemplating intervention must be neutral or impartial as to them. The second kind of problem is the one posed by human rights violations, including violations of humanitarian law and the practice of "ethnic cleansing." As to this problem, there is no such thing as neutral or impartial humanitarian intervention, and nor should there be. The intervention must target the culprits, whoever they are, and force them to desist. If there are culprits on both sides, then both must be stopped. Supporters of neutrality and impartiality cannot legitimately mean that torturers and their victims are equal as to that issue, the issue of torture. Maybe they both must be heard on the territorial question, yet the flaw

185. See, *inter alia*, the statements by delegates from the United States, *Provisional Verbatim Record of the Three Thousand One Hundred and Ninety-First Meeting*, U.N. SCOR, 48th Sess., plen. mtg. at 19-21, U.N. Doc. S/PV.3191 (1993) (international community resolved to enforce Security Council resolutions against those who commit unspeakable violations of human rights); France, *id.* at 3-5 (use of force authorized to enforce flight bans); Cape Verde, *id.* at 13-15 (Security Council must use its authority to put an end to the tragedy of the Bosnian people); Pakistan, *id.* at 17 (citing abhorrent campaign of "ethnic cleansing").

186. Roger Cohen, *Conflict in the Balkans: The Overview*; NATO Presses Bosnia Bombing, Vowing to Make Sarajevo Safe, N.Y. TIMES, Aug. 31, 1995, at A1.

187. UN Returns Fire on Serbs After Shells Blast Sarajevo, CHI. TRIB., Aug. 23, 1995, at 6.

in the traditional United Nations "peacekeeping" approach, and the reason why it has been relatively ineffective, is that it insists upon neutrality and impartiality between the abusers and their victims. In Bosnia, the logic of the situation forced the intervenors to ignore directives on impartiality and to take sides, decisively and in my view correctly, in defense of the victims. Such an action need not prejudice the merits of the dispute, although in some cases, it can be argued that perpetrators of crimes against humanity should lose their normal right to participate in the process of self-determination. Like other cases of humanitarian intervention, the intervention in Bosnia was *overdetermined*: it could easily be justified as an action both to restore peace and to stop the atrocities that had been so well documented. The human rights situation in Bosnia was one of the rationales of the intervention; it also greatly increased the *urgency* for collective action.

IV. COLLECTIVE HARD INTERVENTION

Under the international regime of countermeasures, states have the right to take proportionate non-forcible actions against other states who have violated a legal right of the state that adopts the measure.¹⁸⁸ *A fortiori*, international organizations have the power to adopt coercive but non-forcible enforcement measures against states which refuse to abide by their international obligations. The extent and nature of these powers will depend on the constitutive instrument of the organization. In the United Nations context, the operative provision is Article 41 of the U.N. Charter, which authorizes the Security Council to adopt "measures not involving the use of force" as enforcement means to restore peace and security. The question is whether the Security Council may authorize Article 41 measures against a state whose government has rendered itself guilty of serious human rights violations.

The analysis in the preceding section applies here even more strongly. If the Security Council has the power to authorize the use of force to remedy serious human rights violations, it has, *a fortiori*, the power to authorize measures that do not involve the use of force but do involve more than just discussion or recommendation.

The three most important precedents of sanctions imposed under Article 41 concerned domestic situations. The first is the Rhodesia case.¹⁸⁹ This was an international issue of course, but the chief concern of the United Nations was the racist character of the Rhodesian state, not the vague "threat to international peace" that such situation could create. The

188. See generally ELISABETH ZOLLER, PEACETIME UNILATERAL COUNTERMEASURES (1984).

189. See generally VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSE TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA (1990).

second precedent of hard intervention was the case of *apartheid* in South Africa. While the threat to international peace was perhaps more genuine in this case, the Security Council imposed a series of sanctions against South Africa for its persistent enforcement of the regime of *apartheid* within its borders. These two precedents have been important in putting to rest the argument that Article 41 action ought to be reserved solely for breach or threat of international peace.

The third, and most persuasive, recent example of collective hard humanitarian intervention was the imposition of Article 41 measures against Haiti in response to the interruption of the democratic process in that country.¹⁹⁰ This is an excellent case to test the credibility of the formalist position: was the Security Council *really* imposing Article 41 measures against Haiti to remedy a threat to international peace and security? Or was it instead imposing such measures as a reaction to the violation of human rights? Again, formalists are content with the first explanation, provided that the Security Council uses Article 39 language. This amounts to admitting that the Security Council can characterize any situation as a threat to peace as long as it parrots the language of Article 39. But if one looks at what the Security Council is doing, rather than at what it is saying it is doing, there is no doubt that the second explanation is the correct one.

There is little doubt that today the Security Council can authorize the imposition of economic and other sanctions against states that commit serious human rights violations. But the powers of the Security Council are governed by the Charter and customary law. First, under the principle of necessity, the Security Council is legally *required* to adopt non-forcible measures before it authorizes the use of force. Second, under the principle of proportionality that governs all countermeasures, sanctions under Article 41 ought to be reserved for situations of commensurate gravity. In the case of humanitarian intervention, the violations of human rights need to attain a substantial degree of gravity before the Council can authorize or institute sanctions. The powers of the Security Council are, therefore, subject to the customary law of countermeasures.

SUMMARY AND CONCLUSION

In this article I have attempted to demonstrate the legitimacy of collective humanitarian intervention. I distinguished between three meanings of the concept of intervention: soft intervention, hard intervention, and forcible intervention. I showed that the domain reserved to the exclusive jurisdiction of the state is quite small. International law has evolved to the point that matters which would have been unthinkable for

190. See *supra* part III.D.

states to have relinquished only twenty years ago are now subject to international scrutiny. The most recent and exciting development in this field is the recognition of the principle that requires democratic legitimacy. Additionally, I have shown that the principle that the international community has a right to intervene to uphold basic human rights is supported by the recent practice of the United Nations, in particular by the precedents of Iraq, Somalia, Haiti, Rwanda, and Bosnia.

The end of the Cold War is, of course, the mandatory topic today. Historians, politicians, political scientists, lawyers, and philosophers are attempting to make sense of what happened and why it happened. But surely at least one thing is clear: there would have been no end to the Cold War without the moral defeat of tyranny, without the resolve of the liberal alliance to resist the internal and external pressures of the various enemies of freedom. As Kant rightly argued, democracy and human rights are the only morally defensible foundation of international law. Internal freedom, respect for democracy, and human rights are the features which make states less aggressive, not the other way around. It is a mistake to believe that once states become peaceful they will then turn democratic. On the contrary, only democratic states have a chance to maintain a peaceful and stable international system for a long period of time. The rise of collective humanitarian intervention and the shrinking of traditional conceptions of sovereignty and domestic jurisdiction are essential for the preservation of peace in the new international order. Conversely, if we lose the battle for democracy and human rights, we necessarily lose the battle for peace and security. The lesson is, perhaps, that the gradual dilution of state sovereignty is not just one more historical phenomenon, one more stage in the unfolding of blind Laws of History over which we lack control. It is, rather, a moral imperative.